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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION and NATIONAL LABOR RELATIONS BOARD,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 27, 1974

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INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION and NATIONAL LABOR RELATIONS BOARD,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, International Union of Operating Engineers, Local 701, hereby requests the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this pro-

ceeding on August 29, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit dated August 29, 1974 has not yet been reported. It is reprinted in the Appendix hereto, p. 1a infra. The Decision and Determination of Dispute of the National Labor Relations Board, hereinafter called "Board", has been reported at 181 NLRB 51, 73 LLRM 1369 (1970). It is reprinted in the Appendix hereto, p. 20a, infra.

JURISDICTION

The petitioner union, International Union of Operating Engineers, Local 701, hereinafter called "Operating Engineers 701" filed a charge against International Longshoremen's & Warehousemen's Union Local 50, hereinafter called "Longshoremen 50" under § 8(b)4(D) of the Labor Management Relations Act, 29 USC § 158(b)4(D),

alleging that Longshoremen 50 stopped work until the work of operating the floating cranes was transferred from Operating Engineers 701 to Longshoremen 50. The National Labor Relations Board, held a hearing under § 10(k) of the Labor Management Relations Act, 29 USC § 160(k) and awarded the work of operating the floating cranes to Operating Engineers 701. The Board then issued a complaint against Longshoremen 50 under § 8 (b)4(D) of the Act and found Longshoremen 50 guilty of violating the Act. The Board then petitioned for enforcement of its order. The Ninth Circuit denied the Board's petition for enforcement and remanded the case to the Board for further proceedings. This petition for writ of certiorari has been filed within 90 days from the entry of the Ninth Circuit's judgment of August 29, 1974. The

jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. May the Ninth Circuit reverse the 13-year practice of the Board in awarding work in § 10(k) cases based on "common sense and experience?"

2. May the Ninth Circuit reverse a § 10(k) award which is supported by substantial evidence on the record considered as a whole?

3. May the Ninth Circuit require the Board to accept the findings of an arbitrator based on false testimony in a proceeding which excluded one of the parties to the dispute?

4. May the Ninth Circuit increase the role of the judiciary in deciding § 10(k) cases without directions from Congress or this Court?

STATUTORY PROVISIONS INVOLVED

Section 10(k) of the Labor Management Relations Act, 29 USC § 160(k):

> "(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

* * * * * * * * * * *

Section 8(b)4(D) of the Labor Management Relations Act, 29 USC 8(b)(4)(D):

> "(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in

another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:"

* * * * * * * * * * *

Section 10(e) of the Labor Management Relations Act, 29 USC § 160(e):

"(e).....Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....."

* * * * * * * * * * *

STATEMENT OF THE CASE

This controversy involves a work dispute under § 10(k) of the Labor-Management Relations Act. This case presents the issue of who should operate the floating cranes loading logs from water to ship in the port of Astoria, Oregon, at the mouth of the Columbia River.

The unions claiming the work are Local 701, International Union of Operating Engineers, AFL-CIO, and Local 50, International Longshoremen's & Warehousemen's Union. Both local unions have stated on the record that only the locals and not the internationals are the parties to this dispute. Operating Engineers 701 has members throughout Oregon and the five and one-half counties of Southwest Washington. No member of Longshoremen's 50 testified in this hearing, but the local is based in Astoria and maintains about ten gangs so probably has 100

to 150 active members.

In early April 1969 a sister Longshore local in Portland, Oregon objected to an employer hiring members of Operating Engineers 701 to load a ship at the Rivergate dock just north of Portland. In retaliation, Longshoremen 50 struck the port of Astoria on April 3, 1969 demanding that the work of the floating cranes be taken away from Operating Engineers 701 and given to them. The strike was effective - inexperienced trainees of Longshoremen 50 were put on the floating cranes and have been attempting to operate them ever since.

It may be that there has never been a case presented to this Board in which one of the claimants for the work in dispute had less experience doing the work in question and presented less of a factual case in the hearing.

Before 1964, Astoria was a depressed

port. From 1946 to 1964 there was only one crane in the port of Astoria loading cargo. This was a 47-1/2 ton capacity locomotive crane which moved on tracks on the dock. It was used to load logs, pilings, pulp, steel and other cargo whenever the small ships' cranes could not handle the loads. Logs were loaded by this crane at different times from the water to the ship, from the water to the dock and then from the dock to the ship, and from the dock onto railroad cars.

All of the cargo loading in the port of Astoria during this period was irregular, depending upon the number of ships in port. The locomotive crane sometimes loaded logs steadily for periods up to two months. From 1946 to 1967 the operator of this locomotive crane was Ernie Sunnell, a member of Operating Engineers 701. No longshoreman ever operated this crane during this period.

After Sunnell retired in 1967 the crane was operated until 1969 by Gibbs Marxson, also a member of Operating Engineers 701. No longshoreman operated this crane during this period except for one longshoreman who operated it for two days in 1968.

In 1964 the floating cranes started to come down to Astoria for log loading. In the beginning they would come down from Portland or other Oregon or Southwest Washington ports to load specific ships. Gradually, from 1964 until 1967 the number and frequency of Japanese ships increased. In 1967 the floating cranes were chartered to the stevedore companies and from then until April 3, 1969 stayed in Astoria most of the time though they continue to do other work when log ships are not available. From the time the floating cranes first came to Astoria in 1964 until April 3, 1969 when the Longshoremen struck the port the

floating cranes were always operated by Operating Engineers 701. No Longshoreman ever operated a floating crane in the port of Astoria until after this dispute arose on April 3, 1969.

On April 3, 1969 at 8'oclock a.m. the Operating Engineers 701 crane operators went to their floating cranes as they had for the past five years and lowered the slings into the water. The members of Longshoremen 50 refused to hook up the bundles of logs onto the slings. Then, about 8:30 in the morning, the local manager of the Brady-Hamilton Stevedore Company told the operators on the Willamette-Western cranes that they were fired and they should take their gear and get off the cranes. A little later that day the manager of W. J. Jones and Son told the General Construction Company crane operators that they would not be needed any more. The Longshoremen immediately

went aboard the Willamette-Western cranes and started to figure out how to operate them. Jones did not attempt to operate floating cranes for several months but continued to do the work with winches on the ships being loaded. When Brady-Hamilton and Jones asked the Longshoremen why they had stopped work they replied because of health and safety.

It soon developed that they had no complaint other than that they felt it was not safe to work under a floating crane operator belonging to Operating Engineers 701 because of jurisdictional disputes that a sister longshore union was having with Operating Engineers 701 in Portland, Oregon.

Brady-Hamilton and Jones were members of the Pacific Maritime Association which had a contract with the longshoremen up and down the west coast. They asked for an im-

mediate arbitration under the terms of that contract and the arbitrator decided that there was no legitimate health and safety dispute. Jones and Brady could then have insisted that the longshoremen return to work in the same manner as they were working before the dispute, pending further arbitration of any other claims. Instead of that, even before the arbitrator's decision they immediately turned the jobs over to the longshoremen.

On April 3, 1969 there were ten floating cranes loading logs in Astoria, Oregon. Four were owned by Willamette-Western Corporation; four by General Construction Company and two by Umpqua River Navigation. These cranes have boom lengths of approximately 125-145 feet and can pick up loads of up to 45 tons up to 90 feet away. They are mounted on barges about 100-110 feet in length and 45 feet in width. Most of them

were rebuilt for the specific purpose of loading bundles of logs from rafts in the water in the holds of ships. Though some of them were built as far back as World War II they were all in good operating condition. The value of the cranes ranged from $250,000 to $650,000.

Each of these cranes had a name, a tradition, and an operator who had been with the same crane for years. The cranes - Beaver, Barge 32, Portland, Frisco, Zeus, Titan, Sampson, Goliath and Umpqua Beaver - operated all over the ports of Oregon and the five and one-half counties of Southwest Washington. These cranes and their operators helped build the enormous John Day Dam up-river on the Columbia; they drove the pilings for the Astoria Bridge that connects Oregon and Washington; and they made possible the increased Japanese log trade by loading huge bundles of logs safely and quickly.

There are many cranes in use in modern industry. Cranes are used in logging in the forests of the Pacific Northwest; cranes are used to build new skyscrapers in Portland, Oregon; cranes are used on the docks to load and unload cargo. A few cranes are mounted on barges. In Oregon and the five and one-half counties of Southwest Washington most of the cranes, large and small, are operated by a member of Local 701 Operating Engineers.

Of all the cranes in use in this area, the floating cranes require the greatest skill to operate because they are used to lift very heavy loads and operate from a shifting floating barge bobbing in the water. Lifting bundles of logs from raft to ship with a floating crane requires great skill because 25-ton bundles of wet, slippery logs are constantly being lifted over men's heads. First the sling must be

moved through the air a distance of up to 180 feet. The bundle of logs to be picked up is invariably in a different position from the previous bundle. The crane barge is bobbing in the water and the sling must be presented motionless to the longshoremen.

Then, after the longshoremen on the raft in the water tie the sling to the bundle of logs, the crane operator must lift the bundle without knowing its true weight since it is partially submerged in water. When the 25 tons of logs are picked up in the air this lists the crane to one side and causes a bobbing in the water in addition to the existing action of the tide.

The floating crane has three separate operations, hoisting, booming and swinging. Hosting means lifting the load with the line; booming means lifting or raising the boom from which the line is hung

and swinging means swinging the whole crane up to 360° on the barge. The floating crane operator has nine hand controls and three foot controls to operate. There is no mechanical connection between the controls that do the hoisting, booming and swinging. To get the load from the water to a position above the hold of a ship with adequate speed the experienced floating crane operator must hoist, boom and swing at the same time, coordinating the three separate motions. The floating crane operator must pick the load up in the air, raise it above the level of the ship and move the load over whatever hatch is then being loaded.

In the third phase of the operation the load has to be deposited in the hatch, usually in a place which cannot be seen by the floating crane operator. The operator must take signals from a hatchtender concerning

the lowering and placing of the load, while at the same time remembering the capabilities of the crane.

When the load is released the crane bobs in the water with its stability helped by a counterweight. Even though 25-45 tons of weight have just been released, the floating crane operator must clear the hatch and the side of the ship without doing any damage to property or personnel and get the sling back to the raft and present it motionless.

On April 3, 1969 there were eleven Operating Engineers 701 crane operators and ten Operating Engineers 701 firemen or oilers working the floating cranes in Astoria. Each was a skilled craftsman with years of experience. On April 3, 1969 there was no member of Longshoremen 50 who had ever operated a floating crane or a land crane (one longshoreman operated a land crane for two days in 1968). No Long-

shoreman had any experience firing the boilers of steam cranes or acting as an oiler on diesel cranes.

The facts as developed in the 17 day hearing before the Board may be summarized as follows:

1. Operating Engineers 701 operated the cranes in Astoria from 1946 until the day this jurisdictional dispute started on April 3, 1969. Longshoremen 50 had never operated the cranes in Astoria.

2. Operating Engineers 701 had skilled, competent operators of the floating cranes which are most difficult machines to operate and require years of experience. Longshoremen 50 had no one who ever operated a floating crane.

3. Operating Engineers 701 can operate the floating cranes more economically because they can maintain and service the cranes, rebuild them and overhaul them

while the cranes are not working and do other work with the floating cranes while there is no cargo available. Longshoremen 50 have no comparable experience. Furthermore, Operating Engineers 701 operate the steam cranes with one operator and one fireman, while Longshoremen 50, after April 3, 1969, required two operators and a fireman for a steam crane.

4. Longshoremen 50 did more damage to the floating cranes in the few months of partial operation between April 3, 1969 and the date of the Board hearing than Operating Engineers 701 did in the previous five years of continuous operation.

5. Operating Engineers 701 operate almost all of the floating cranes in use in West Coast ports. Before April 3, 1969, the only floating cranes operated by longshoremen on the entire West Coast were one steam crane in Portland, Oregon, plus

another steam crane part of the time in Portland and possibly one crane in Port Angeles, Washington. All other floating cranes on the West Coast have been operated by operating engineers.

6. Longshoremen 50 had long acquiesced in the work assignment of the floating cranes in Astoria to Operating Engineers 701. Before April 3, 1969, the members of Operating Engineers 701 who operated the floating cranes and the members of Longshoremen 50 who hooked up the cranes and stowed the logs in the hold of the ship worked closely together in harmony.

7. All employers who stated a preference at the Board hearing preferred to have the floating cranes operated by Operating Engineers 701. Preferences for Operating Engineers 701 were stated by Willamette Western and General Construction who owned the cranes and leased them to the two steve-

dore companies. The only witness from Jones Stevedore Company who testified was the Astoria manager who was neutral. No one from Brady-Hamilton Stevedore Company testified at the Board hearing.

8. The contract between the Longshoremen and Pacific Maritime Association excluded the floating cranes from being longshore tools. In subsequent Joint Committee meetings between the Pacific Maritime Association and the Longshoremen up and down the West Coast, Pacific Maritime Association at all times contended that the floating crane was not a longshore tool and resisted taking floating crane work away from skilled non-longshoremen. The stevedore companies and the crane owning companies were co-employers of Operating Engineers 701. 1/

1/ Co-employer status was found by the United States District Court for the District of Oregon in Henderson v. Operating Engineers 701 and Longshoremen 50, Case No. 69-258 (1972)

As co-employers, the stevedore companies were bound by the Operating Engineers 701 collective bargaining contract to employ persons dispatched from the Operating Engineers hiring hall.

9. After the work stoppage by Longshoremen 50 of April 3, 1969, and after the § 8(b)4(D) charge was filed by Operating Engineers 701, Longshoremen 50 and the Pacific Maritime Association submitted to their arbitrator the question of whether floating cranes in Astoria should be run by members of Longshoremen 50. Operating Engineers 701 was excluded from this proceeding. At that arbitration proceeding, both parties contended that the work belonged to Longshoremen 50. At the arbitrator's hearing, neither party submitted to the arbitrator the memoranda of joint committee meetings which showed that at all times prior to April 3, 1969

Pacific Maritime Association had contended that operating the floating cranes was not longshore work. Neither party in the arbitration informed the arbitrator that there was not a single longshoremen in the Port of Astoria with any experience operating either a floating crane or a land crane. The arbitrator's opinion recites that he received an affidavit stating that there were longshoremen in the Port of Astoria with the skills and experience to operate these floating cranes.

This affidavit upon which the arbitrator relied was false and is contradicted by the evidence before the Board and admissions made on April 3, 1969 by a Longshoremen 50 Labor Relations Committee member.

After the Longshoremen 50 work stoppage on April 3, 1969, and the employer transfer of the floating crane work to Longshoremen

50, Operating Engineers 701 filed an § 8(b)4(D) charge and the jurisdictional dispute § 10(k) case came on for a 17 day hearing before a Hearing Officer of the Board. The Board in its Decision and Determination Award unanimously gave the work to Operating Engineers 701. Longshoremen 50 refused to comply and the Board issued a complaint charging Longshoremen 50 with a violation of § 8(b)4(D) of the Act. A three day hearing followed, after which the Board unanimously found Longshoremen 50 guilty of violating § 8(b)4(D). Longshoremen 50 refused to comply with the orders of the Board contained in the decision and the Board sought enforcement under 29 USC § 160(e).

The Court of Appeals for the Ninth Circuit has now vacated the decision of the Board on the grounds that:

1) The Board's Finding of Fact (called

a Conclusion of Law by the court) that Longshoremen 50 had a better contract claim for the work was in error, since the Board refused to rely on the award made by the Longshore industry arbitrator in a proceeding which excluded Operating Engineers 701 and which took place after Operating Engineers 701 had filed its charge with the Board.

2. The Board was arbitrary and capricious in this case (and in all jurisdictional dispute cases that it has decided in the past 13 years) by refusing to define the weight that it gives to various factors in reaching its determination on the facts.

Operating Engineers 701 now petition for certiorari.

REASONS FOR GRANTING THE WRIT

In 1961, this Court in NLRB v. Radio and Television Broadcast Engineers Union Local 1212 (CBS), 364 US 573 (1960) in-

structed the Board to decide jurisdictional disputes on the facts. From 1961 until 1974, cases that the Board decided on the facts were universally upheld in every Circuit which reviewed them. The only jurisdictional dispute that went to this Court during the period was NLRB v. Plasterers' Union Local No. 79,(Plasterers'), 404 US 135 (1971), in which it was decided that an arbitration between two competing unions did not bind the employer in a § 10(k) case since he was not a party to the arbitration.

The Ninth Circuit now invites this Court to review the basis of Board decision making in § 10(k) cases. It does this by overruling 13 years of Board and court precedents which allow the Board to make its own findings of fact as required by CBS, thereby usurping the function of the Board. The Ninth Circuit also seeks to

impose a weighted standard on the Board and revise the scope of judicial review provided by Congress. The Ninth Circuit further invites review by requiring the Board to give controlling weight to an arbitrator's decision grounded in false testimony and from which one party, Operating Engineers 701, was excluded, all contrary to the Plasterers' case.

1. THE NINTH CIRCUIT'S DECISION REQUIRING THE BOARD TO SET WEIGHTED STANDARDS FOR DECISION IN § 10(k) CASES IS IN DIRECT CONFLICT WITH THE CBS CASE WHICH REQUIRES THAT THE BOARD DECIDE § 10(k) CASES BASED ON ITS EXPERIENCE AND COMMON SENSE.

The Ninth Circuit requires the Board to set weighted standards for the various factors that it uses to decide § 10(k) cases. (See p. 17a, infra) This position of the Ninth Circuit is essentially the position taken by the Board before CBS was decided in 1961. In CBS it was decided that the NLRB must take affirmative action

on § 10(k) cases and award work involved to one of the disputing parties in order to settle work disputes. In rejecting the contention that the Board had no standards to apply to the decision of § 10(k) cases, this Court stated:

> "It is true that this forces the Board to exercise under § 10 (k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." CBS, supra, 364 US at 583.

The Court specifically rejected the Board's contention that it had only the narrow duty to examine strictly legal considerations growing out of prior Board orders, certifications, or collective bargaining agreements in order to decide a § 10(k) dispute, and ordered a broader scope of review stating that the Board should base its decision on

> ". . . factors deemed important in arbitration proceedings, such as the nature of the work, the practices and customs of this and other companies and of these and other unions, and upon other factors deemed relevant by the Board in the light of its experience in the field of labor relations." CBS, supra, 364 US at 578.

The Board in this case did exactly what this Court instructed it to do in CBS. It held 17 days of hearings and then unanimously by decision and determination of dispute awarded the floating crane work to Operating Engineers 701. The decision of the Board was not surprising. Long-

shoremen 50 may be the first union in the history of jurisdictional disputes in this country to claim work for which not a single member of the local union has ever had any experience. No member of Longshoremen 50 testified at the hearing before the Board. The Board's decision weighed the various factors and emphasized those it felt to be compelling in this case. Any finding of fact requires a fair understanding of the record, and in this case there were numerous pages of testimony and multiple exhibits upon which the Board based its decision.

The Board, just like a jury, is supposed to rely, as this Court has instructed in CBS upon "experience and common sense." A fact finder is not supposed to be relying on findings of fact in previous cases. The facts in previous cases are inadmissible before juries. a good arbitra-

tor decides, based on the facts that have been put in evidence before him, and not by review of the opinions of other arbitrators dealing with other facts. Administrative agencies were created by Congress to develop expertise in fact finding, and stare decisis plays a much more limited role in the administrative process than it does in the judicial process. NLRB v. Wyman Gordon Company, 394 US 759, 766 (1969).

The Board in this case stressed history, acquiesence, the contract claim to the work of Operating Engineers 701, skill, experience, efficiency of operation, economy and safety as the basis for its award. How would we measure the eight factors discussed by the Board in its decision?

The Ninth Circuit wants the Board to establish weighted standards for its fact finding. This is not what this

Court instructed the Board to do in CBS. If the Board were now to go into a rule making procedure and decide that a 50% weight should be given to one factor and a 25% weight given to another factor, this would have to be an administrative procedure act hearing in which all employers and employees in the country might want to appear and present their viewpoint. See 5 USC § 553. The problem, as every fact finder knows, is that the weight to be given to any one factor depends on its relation to other factors in the specific situation. Neither the Ninth Circuit nor anyone else can reduce this to a precise measurement for all cases. If for example, in our case at Astoria, Oregon, the members of Longshoremen 50 had even a little experience operating floating cranes the Board might have given another factor equal importance. But since no members of

Longshoremen 50 had ever in his life operated a floating crane, and the work required lifting 40 tons of logs over men's heads, who is to quantify the weight that the Board should give in this case to human safety?

The Ninth Circuit compounds the error by instructing the Board that it should give controlling weight to factors of contract and employer preference. This too reveals the error of the Ninth Circuit's thinking since these were the factors that were dominant before the CBS case.

If employer preference is given controlling weight, the employer could enter into a new contract with lower paid employees, rather than the union that represented the existing higher paid employees. Then if the old union stopped work in protest, the employer could argue his preference was for the new lower paid

workers and win the § 10(k) dispute. The Ninth Circuit decision asking that controlling weight be given to employer preference is an invitation to sweetheart contracts and union busting. See Note, Jurisdictional Disputes Since CBS, The CBS Decision, 39 N.Y.U. L.Rev. 657, 684 (1964). This, of course, is in marked contrast to the present practice which holds that if an employer wishes to assert his right to relief against a union's picketing he must justify his assignment of work in a § 10(k) hearing. NLRB v. Plasterers' Local Union No. 79, 404 US 116, 124 (1971).

Providing a weight for each factor in the decision making process in § 10(k) cases is a legislative function which Congress has not seen fit to exercise. This was pointed out by this Court in CBS. Such a requirement cannot be imposed by the United States Court of Appeals for

the Ninth Circuit.

2. THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH ALL OTHER CIRCUITS WHICH HAVE REVIEWED § 10(k) DECISIONS AND IGNORES THIRTEEN YEARS OF OPINIONS WHICH HAVE FOLLOWED CBS.

In the first § 10(k) NLRB case subsequent to CBS, International Association of Machinists, Lodge 1743 (J. A. Jones Construction Co.) 135 NLRB 1402 (1962), the Board set out the procedures which it intended to use in these cases in the following language:

> "At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the

> employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot at this time establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. It may be that later, with more experience in concrete cases, a measure of weight can be accorded the earlier decision." Jones, supra, 135 NLRB at 1410.

CBS and the Jones decision set the ground work for Board decisions for the past 12 years. The standards set by these cases and the Board's technique of considering all factors in rendering § 10(k) decisions have been uniformly approved over the years by each of the Circuits that have considered the question. NLRB v. International Longshoremen's & Warehousemen's Union, 378 F2d 33 (9th Cir 1967); NLRB v. International Longshoremen's & Warehousemen's Union, 413 F2d 30 (9th Cir 1969); Local 134, International Brother-

hood of Electrical Workers v. NLRB, 486 F2d 836 (7th Cir 1973); NLRB v. International Die Sinkers' Conference, Milwaukee Lodge, 402 F2d 407 (7th Cir 1968); NLRB v. Local 25, International Brotherhood of Electrical Workers, 396 F2d 591 (2nd Cir 1968); NLRB v. St.Louis Printing Pressmen & Assistants Union No. 6, 385 F2d 956 (8th Cir 1967); New Orleans Typographical Union No. 17 v. NLRB, 368 F2d 755 (5th Cir 1966); NLRB v. Denver Photographers Union No. 18, 351 F2d 67 (10th Cir 1965); NLRB v. International Brotherhood of Electrical Workers, 339 F2d 145 (2nd Cir 1964); NLRB v. Local 991, International Longshoremen's Association, 332 F2d 66 (5th Cir 1964); NLRB v. Local 825, International Union of Operating Engineers, 326 F2d 213 (3rd Cir 1964). The Ninth Circuit has clearly ignored the mandate of CBS and the clear

line of cases which have followed CBS up to the present time.

3. THE DECISION OF THE NINTH CIRCUIT WILL ALTER THE SCOPE OF JUDICIAL REVIEW OF § 10(k) DECISIONS BY SUBSTITUTING A "CLEARLY ERRONEOUS" STANDARD FOR THE "SUBSTANTIAL EVIDENCE" STANDARD MANDATED BY CONGRESS, THEREBY USURPING THE FUNCTION OF THE BOARD.

Section 10(e) of the Act, 29 USC § 160(e) provides:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

The substantial evidence standard is generally defined as what a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Company v. NLRB, 305 US 197, 229 (1938); Richardson v. Perales, 402 US 389, 401 (1971). In NLRB v. Nevada Consolidated Copper Corporation, 316 US 105 (1942), this Court held that under the substantial

evidence rule the possibility of drawing inconsistent inferences from a body of evidence does not prevent the drawing of one of these inferences, and if the Board does so, the Court cannot set this inference aside. See also, Consolo v. Federal Maritime Commission, 383 US 607, 620 (1966). In addition, it has been held that the decisions of the NLRB will not be enforced if upon considering the entire record, they appear to be arbitrary and capricious. Packard Motor Car Company v. NLRB, 330 US 485 (1947). This arbitrary and capricious standard has been applied by courts in reviewing § 10(k) decisions. NLRB v. St. Louis Printing Pressman & Assistants Union No. 6, supra, at 960. The necessity for this loose standard of review in protecting the broad discretion given to the Board has been articulated by the Courts of Appeal in various ways.

In NLRB v. International Longshoremen's & Warehousemen's Union, supra, the court stated:

> "We must accept the Board's determination that employees represented by the Aluminum Workers union were, under the undisputed facts, entitled to this work assignment unless such determination is arbitrary and capricious. Our function is limited in this manner because, as in the case of all jurisdictional disputes, the Board was called upon to apply its experience and special expertise in considering all relevant factors, unfettered by rigid standards." 413 F2d at p. 33.

The case of NLRB v. St. Louis Printing Pressman & Assistants Union No. 6, supra, stated:

> "It is settled, however, that the Board's area of discretion in disposing of § 10(k) controversies is wide and indeed, 'involves of necessity a large measure of informed discretion.'"
>
> * * * * * * * * *
>
> "It has been noted, too, that there are no rigid standards of decision in § 10(k) matters and that the Board is thus free to resolve these matters on a case-by-case basis where experience

> and common sense are important factors." 385 F2d at p. 960

In New Orleans Typographical Union No. 17 v. NLRB, supra, the court stated:

> "Congress, in § 10(k), did not prescribe standards which the Board is required to follow in determining these disputes. No court, so far as we know, has proposed to legislate in this field. Neither the Board or this Court can promulgate a rule such as here suggested." 368 F2d at p. 764.

The Fifth Circuit clearly understood that if weighted standards were involved, the court would be moving toward a different scope of review than that set out in 29 USC § 160(e). The Court stated:

> "It is quite evident that if we were here dealing with rigid standards of determination and if this were a judicial proceeding controlled by such factors as the preponderance of the evidence, the ultimate decision might very easily have gone the other way. Remembering that Congress prescribed no § 10(k) standards, and that the Order must be reviewed on the record as a whole, can we confidently say that there

> was no substantial evidence to support what the Board did?" 368 F2d at p. 765.

The Board decision in this case is based on substantial evidence in the record considered as a whole that floating cranes were excluded from longshore work. The Longshore contract provides:

> "1.12 The term 'longshore crane' does not include any classes of tools or equipment not presently in use on the waterfront. The term 'longshore crane' shall not include cranes or other hoisting equipment mounted on any ship, floating-crane barge, or other vessel. The foregoing provisions may be modified, on motion of either party, by action of the Joint Coast Labor Relations Committee determining that any tools or equipment described in 1.12 shall be 'longshore cranes' subject hereto." (PMA Ex 114, sec 1.12, p. 137)

The Ninth Circuit attempts to evade the substantial evidence rule by saying that its belief that the Board misinterpreted the Longshoremen's Contract is a conclusion of law rather than a finding of

fact. The determination of the Board that the floating crane was not a longshore tool was based on contract language, the evidence of three Joint Committee meetings between the Longshoremen and the Pacific Maritime Association and substantial testimony about those three meetings.

The Board also finds that Operating Engineers 701 have a contract claim to the work because stevedore companies and the crane owning companies were co-employers of the Operating Engineers 701. There is a clause in the agreement between Brady-Hamilton Stevedore Company and Willamette Western, the crane owner, which states that the Operating Engineers:

> "shall be deemed for all purposes the employees of the charterer."

There is substantial evidence in the record dealing with the effect of this language in the Operating Engineers 701

contract and the extent to which the foreman of the charterer, the stevedore company, in fact exercises supervision over the Operating Engineers 701. There were hundreds of pages of disputed testimony and exhibits which were resolved by the Board in its finding of fact that the Operating Engineers 701 had a better contract claim to the work. All of this evidence is ignored by the Ninth Circuit in its assertion that this was a conclusion of law. Not only was this finding not a conclusion of law but it shows the danger in the Court of Appeals attempting to usurp the fact finding function of the Board.

It may be that the Ninth Circuit, after examining the entire record, was left with the definite and firm conviction that a mistake had been committed by the Board in its fact finding on the contract language

and the joint committee negotiating history that followed. If a clearly erroneous standard was permissible in NLRB cases, then the Ninth Circuit could have reversed. United States v. United States Gypsum Company, 333 US 364, 395 (1948). But where the substantial evidence standard is mandated by Congress in § 10(k) cases the Ninth Circuit decision is not only in error but places all Board fact finding in future § 10(k) cases in jeopardy.

4. BY REVERSING THE BOARD AND HOLDING THAT THE ARBITRATION BETWEEN PACIFIC MARITIME ASSOCIATION AND THE LONGSHOREMEN WAS DETERMINATIVE IN AWARDING THE WORK TO THE LONGSHOREMEN, THE NINTH CIRCUIT IGNORED THE HOLDING IN PLASTERERS' REQUIRING THAT ONLY ARBITRATIONS IN WHICH ALL INTERESTED PARTIES HAVE PARTICIPATED BE GIVEN EFFECT.

The Board has followed the rule that arbitrations will be ignored unless all parties to the dispute are parties to the

arbitration. Lithographers and Photoengravers (Beacon Journal Publishing Co.), 185 NLRB 464 (1970); International Longshoremen's & Warehousemen's Union (Matson Navigation Co.) 140 NLRB 449 (1963). This rule is based in the concept of fundamental due process that every party is entitled to a hearing before an impartial tribunal. If a party, such as Operating Engineers 701, is excluded from an arbitration, the true facts are not likely to be developed.

The reason for the rule has never been clearer than in this case. As of April 3, 1969, the day of the work stoppage by Longshoremen 50, everyone was in agreement that the Longshoremen's contract excluded floating cranes. The Longshoremen's contract so provided and Pacific Maritime Association had resisted any changes in the language or effect of the contract

provision. Then, after the fact, Longshoremen 50 and Pacific Maritime Association decided they wanted to rewrite history nunc pro tunc. After Operating Engineers 701 had filed the charge based on the Labor Management Relations Act, Longshoremen 50 and Pacific Maritime Association went through a curious farce. They invoked arbitration under their contract and in the hearing before the arbitrator, they both argued that the floating crane work in Astoria should be done by Longshoremen 50. The contract provided that this could only be done if there were skilled longshoremen available to do the work. Accordingly, a sworn affidavit was submitted to the arbitrator that there were available in the Port of Astoria members of Longshoremen 50 who had experience operating floating cranes. This was false. On April 3, 1969, a member of the

Longshoremen's Labor Relations Committee told Pacific Maritime Association that not one member of Longshoremen 50 had any experience operating a floating crane. This fact was overwhelmingly demonstrated in the 17 day trial before the Hearing Officer of the Board. The arbitrator then recited this false fact as the basis for his arbitrator's award.

If Operating Engineers 701 had been a party to that after-the-fact arbitration as they were a party in the Board proceeding, the falsehood could never have become the basis for the arbitrator's decision.

This Court understands the significance of not requiring a party to be bound by a decision in which he does not participate. In the Plasterers' case, in a § 10(k) setting, two competing unions took their dispute to the AFL-CIO Joint Board which awarded the work to one of them in an arbitration

proceeding based on a 1917 inter-union agreement. The employer was not a participant in that arbitration proceeding and the Court made this the basis of its decision in refusing to give any effect to such an arbitration award. The Ninth Circuit in taking the narrow view and requiring the Board to give controlling weight on the interpretation of a contract to the factual evidence developed in an ex parte hearing before the arbitrator, when the Board knows that the evidence is false, is directly contrary to the Court ruling in Plasterers'. It would require the Board to follow a procedure which is contrary to every sense of due process.

CONCLUSION

When the Ninth Circuit says that it believes the scope of review in § 10(k) cases is a "paper tiger," it is seeking a larger role for the judiciary in determining

work disputes. But any decision by a single Circuit that disagrees with the decisions of this Court and all other Circuit Courts as well as rejecting the standard of review specified in the Act has a catastrophic effect on labor management relations.

The Ninth Circuit stresses that "since CBS the Supreme Court has not had occasion to review the Board's § 10(k) decision-making process, though it has reiterated that it is the Board's duty to make affirmative work awards." (See p. 17a, infra) The opinion of the Ninth Circuit is almost a petition to this Court to take a new look at the CBS case and the way it has been implemented. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 50, *Respondent,* and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 701, *Intervenor.*	No. 72-1908
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 50, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent,* and PACIFIC MARITIME ASSOCIATION, *Intervenor.*	No. 72-2263
PACIFIC MARITIME ASSOCIATION, BRADY-HAMILTON STEVEDORE CO.; and W. J. JONES & SON, INC., *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent,* and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 701, *Intervenor.*	No. 72-2315

[August 29, 1974]

On Application for Enforcement and On Petitions for Review of an Order of the National Labor Relations Board

Before: MERRILL and DUNIWAY, Circuit Judges, and TAYLOR,* District Judge.

OPINION

DUNIWAY, Circuit Judge:

The National Labor Relations Board petitions, in No. 72-1908, under 29 U.S.C. §160(e), for enforcement of its cease and desist order against Local 50 of the International Longshoremen's and Warehousemen's Union. In Nos. 72-2263 and 72-2315, Local 50 and the Pacific Maritime Association (PMA), an association representing the employers, petition to set the Board's order aside. We deny enforcement in No. 72-1908 and grant the petitions in Nos. 72-2263 and 72-2315.

This is the fourth time that litigation stemming from this particular jurisdictional dispute between Local 50 (the Longshoremen) and Local 701 of the International Union of Operating Engineers (the Engineers) has reached this court. Two of our previous decisions have been published and in them we extensively reviewed both the underlying facts of the dispute and the administrative proceedings that led to judicial review. See *Henderson v. International Longshoremen's and Warehousemen's Union, Local 50,* 9 Cir., 1972, 457 F.2d 572; *Henderson v. International Union of Operating Engineers, Local 701,* 9 Cir., 1969, 420 F.2d 802. The Board's decisions in this case are reported at 193 N.L.R.B. 266 (1971) and 181 N.L.R.B. 315 (1970). Rather than once again burdening the books with a full recitation of the legal history of this dispute, we will state the facts only in the barest outline necessary for the present decision.

On April 3, 1969, in Astoria, Oregon, raftmen represented by the Longshoremen refused to hook up logs to barge-mounted floating whirly cranes which were loading logs onto ships and were operated by employees represented by the Engineers. This work stoppage resulted in the firing of the engineer crane operators by Brady-Hamilton Co. and W. J. Jones & Son, Inc., the stevedoring companies which had leased the barges and cranes, with their crews, from their owners. Longshoremen then began

*The Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

operating the cranes and they have done so ever since. In the work assignment dispute that has culminated in this litigation, both the Longshoremen and the Engineers claim the right to be assigned to operate the barge-mounted floating whirly cranes loading logs on ships in Astoria.

Shortly after the work stoppage, the Engineers filed unfair labor practice charges against the Longshoremen with the Board. The Engineers also began picketing the Brady-Hamilton and Jones jobsites. PMA, representing the employers, then filed unfair labor practice charges against the Engineers. The Board's Regional Director obtained an injunction under §10(l), 29 U.S.C. §160(l) of the National Labor Relations Act (NLRA). See *Henderson v. International Union of Operating Engineers, Local 701, supra.* After a short investigation, the Board concluded that there was reasonable cause to believe that both the Longshoremen and the Engineers had violated §8(b)(4)(D) of the NLRA (29 U.S.C. §158(b)(4)(D)), which forbids coercive union activity designed to force any employer to assign work to one union instead of another. As a result of this preliminary finding, the Board held hearings under §10(k) (29 U.S.C. §160 (k)) to determine which set of employees was entitled to the work in dispute. At the conclusion of these hearings, the Board held that the employees represented by the Engineers were entitled to the work, 181 N.L.R.B. 315, 317.

The Longshoremen failed to notify the Board within the ten days fixed by the statute that it would comply with the Board's determination, and therefore the Board issued an unfair labor practice complaint against the Longshoremen. Hearings were held, and the Trial Examiner found that the Longshoremen had violated §8(b)(4)(i)(ii)(D) of the NLRA and the Board adopted his findings, conclusions and recommendations and issued a cease and desist order against Local 50, 193 N.L.R.B. 266. This is the order that the Board now seeks to have enforced and that the Longshoremen and PMA seek to have set aside.

In an enforcement proceeding such as this, based upon the Board's determination that a union has violated §8(b)(4)(D), there is usually no question that the union has committed unfair labor practices within the plain meaning of the statute, assuming that the Board's §10(k) decision is valid. As the Supreme Court

has noted, §8(b)(4)(D) is inextricably tied to §10(k). *NLRB v. Plasterers' Union*, 1971, 404 U.S. 116, 123; *NLRB v. Radio and Television Engineers, Local 1212*, 1961, 364 U.S. 573, 576 (hereinafter referred to as the *CBS* case). Because the Board's §8(b)(4)(D) complaint is predicated upon its resolution of the work assignment dispute in the §10(k) hearing, the crucial question, in this case, is whether the Board's §10(k) award is sustainable. *NLRB v. International Longshoremen's and Warehousemen's Union*, 9 Cir., 1967, 378 F.2d 33, 34. The only significant issues raised by the briefs submitted in this case concern the validity of the Board's §10(k) award.[1] If we determine that the Board's assignment of the disputed work to the Engineers is sustainable then the Board's cease and desist order must be enforced. Conversely, if we determine that the §10(k) work award is not sustainable then enforcement should be denied.

THE BOARD'S WORK AWARD

Since it has begun making affirmative work awards under §10(k) in jurisdictional disputes, the Board has formulated its decisions in the same manner in the overwhelming majority of its cases. These decisions generally segregate the factors evaluated, discuss them in separate paragraphs, and make individual determinations about which union a particular factor favors. In its conclusions the Board usually cites the most influential of these factors. However, the Board almost always disclaims reliance

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[1]In its brief, PMA urges us to hold that §10(k) decisions are directly reviewable. Twice before we have rejected this suggestion on the ground that no final order results from a §10(k) hearing. *Henderson v. International Longshoremen's and Warehousemen's Union, Local 50, supra*, 457 F.2d at 577-78; *NLRB v. International Longshoremen's and Warehousemen's Union, supra*, 378, F.2d at 35-36. The decisions of this court in *Waterway Terminals Co. v. NLRB*, 9 Cir., 1972, 467 F.2d 1011, and of the Supreme Court in *NLRB v. Plasterers' Union, supra*, only serve to reinforce our holding that §10(k) decisions are not directly reviewable.

PMA and the Longshoremen also challenge the Board's order on the grounds that the Board failed to conform to the procedural requirements of the statute. These claims by their terms involve a challenge to the Board's procedures in all §10(k) hearings. We need not entertain such a sweeping challenge to the Board's procedures because we grant the relief sought by the PMA and the Longshoremen on other grounds.

upon any particular factor by asserting that the decision was made "[u]pon the entire record, and after full consideration of all relevant factors. . . ." *Local 2, IUOE (PVO Int'l, Inc.)* 209 N.L.R.B. #109 at 10 (1974).

Unfortunately, the Board's decisionmaking process was, if anything, more obtuse than usual in the §10(k) case under review. In its opinion the Board moved almost aimlessly from factor to factor without making explicit how much weight a particular factor was given or in some instances even which union the factor favored. Despite this unsatisfactory method of analysis, the Board did mention nine of the factors that it frequently evaluates in jurisdictional dispute decisions.

The Board noted that Engineers had operated the floating cranes loading logs on ships at Astoria from the time of their introduction there in 1964 until the work stoppage in 1969, and that the Longshoremen had "long acquiesced" in this assignment. Thus the factors of past practice and acquiescence were presumably found to favor the Engineers.

The Board was more explicit in holding that the factors of skill, economy and safety favored the Engineers. The Board found that the work in question was very difficult and that the Longshoremen were, without exception, inexperienced at this work while the Engineers were highly skilled floating crane operators. The Board also found that after the Engineers were fired and replaced by Longshoremen, the safety record of the crane operation deteriorated while the expense of it increased. Outside repairmen had to be hired after the Engineers were fired because the Longshoremen, unlike the Engineers, were unable to service the cranes.

Additionally, the Board held that the Longshoremen's Board certification did not cover the disputed work because the certification was issued before the introduction of this type of crane. In considering the PMA-Longshoremen collective bargaining contract, to which the employers, Brady and Jones, were bound, the Board concluded that the agreement specifically excluded the disputed work from its provisions. The Board also distinguished prior Board §10(k) decisions which had accorded this PMA-Longshoremen contract significant weight. Finally, while the Board failed

to discuss employer preference, it did mention the fact that the employers' original work assignment was to the Engineers.

In sum, the Board's §10(k) decision appears to rest upon the finding that the Engineers were more skilled, efficient, and safe employees whose work assignment the factors of past practice and acquiescence also favored. In finding in favor of the Engineers, the Board rejected the Longshoremen's claims that the factors of Board certifications, industry practice, collective bargaining agreements, employer preference, and Board precedent favored them.

JUDICIAL REVIEW OF §10(k) WORK AWARDS

There are two components of judicial review of §10(k) work assignments. First, in reviewing the Board's findings of fact, we are statutorily bound to apply the substantial evidence test. 29 U.S.C. §160(e). Therefore, "findings of the Board with respect to questions of fact, shall be conclusive, if supported by substantial evidence on the record considered as a whole." *NLRB v. International Longshoremen's and Warehousemen's Union, supra,* 378 F.2d at 35; *Waterway Terminals Co. v. NLRB, supra,* 467 F.2d at 1018. Second, we examine the Board's legal conclusions in light of its fact findings. At this stage of judicial review, we apply the arbitrary and capricious standard: "[w]e must accept the Board's determination . . . unless such determination is arbitrary and capricious." *NLRB v. International Longshoremen's and Warehousemen's Union,* 9 Cir., 1969, 413 F.2d 30, 33. In turn we will apply these tests to the challenged work award.

Substantial Evidence Test

There is an abundance of evidence in the record to support the Board's findings that at the time of the work stoppage the Engineers were more skilled, efficient and safe crane operators than were the Longshoremen. The findings as to past practice and acquiescence, which buttress these conclusions, are also supported by substantial evidence.

The Board's finding and conclusion that the Longshoremen's certification does not support a work award to them in this instance is also supported by the evidence. The 1938 Longshoremen certification, which is coastwide, covers only "longshore work." *Shipowners Ass. of Pacific Coast,* 7 N.L.R.B. 1002, 1041 (1938).

Nothing in that certification specifically places the operation of barge-mounted floating whirly cranes loading ships within the Longshoremen's occupational jurisdiction. To assert that this work is by definition contained within the rubric "longshore work" would be to assume the answer to the central question at issue. The Board rejected such circular reasoning.

The main thrust of the PMA-Longshoremen argument for the denial of enforcement is that the Board misconstrued the PMA-Longshoremen collective bargaining contract. We agree.

In 1959, PMA and the Longshoremen entered into a coastwide mechanization agreement in an attempt to reconcile the need for the introduction of labor-saving machinery with the interests of the Longshoremen in job security. The PMA-Longshoremen briefs concede, as they must, that this agreement, as originally executed, explicitly excludes the operation of barge-mounted floating whirly cranes from the agreement's terms. The Board relied upon this clause to hold that the contract did not apply to the work in question.

PMA and the Longshoremen argue, however, that the agreement must be read in light of the interpretation given to it by the parties to it. They point out that shortly after the work stoppage, the parties entered into arbitration pursuant to a clause in the agreement to determine whether or not the agreement covered the disputed work. At the conclusion of the arbitration, on May 8, 1969, the Coast Arbitrator held that: "The position of the ILWU that the Agreement has assigned the work of operating floating cranes in Astoria to Longshoremen is sustained." This decision, we think, falls within the terms of the agreement, which contemplates the extension of the agreement to new types of equipment that may be introduced by the employers.

In its §10(k) opinion, the Board completely ignored the results of this arbitration. This position was consistent with the Board's policy that it will not be bound by arbitration that does not include all of the parties to a jurisdictional dispute. See, e.g., *Lithographers & Photoengravers Int'l (Beacon Journal Publishing Co.)* 185 N.L.R.B. 464 (1970). See also Johns, Jurisdictional Disputes Under the NLRA, *Labor Law Developments 1967* at 46 (1967). This Board policy may be prudent in most instances.

However, it was not appropriately applied to the arbitration in this case.

In many cases a jurisdictional dispute will arise between two unions, each of which has a contract with the same employer. This is the type of case that was before the Court in *CBS, supra.* In such a case the Board can hardly be bound to give effect to an award under one of the contracts which gives the disputed work to one of the unions when the other was not a party to the arbitration.

This case is different. The employers, Brady and Jones, never were parties to a collective bargaining contract with the Engineers. For some years they had leased the barges and cranes from owners who did have a contract with the Engineers. The leased barge-cranes had previously been used for different work in the heavy construction industry, not for loading logs on ships. The lessors provided the operators, who became loaned employees of Brady and Jones. This, however, did not give rise to a collective bargaining agreement between the Engineers and Brady and Jones.

Moreover, immediately after the dispute arose, Brady and Jones found that the owners would lease the barges and cranes to them "bare-boat," i.e., without any crew. At that point the connection between Brady and Jones and the Engineers ceased. No one has claimed that there was any breach of contract between Brady and Jones and the Engineers when this was done. To hold that there was would be to lock the employers into a contract to which they were not parties merely because, when they first started to use the equipment, they leased it with crew. They would never be able to use the same equipment, whether leased or purchased, with their own employees as operators, unless they dealt with the same union as the one with which the former lessors had a contract. See *I.L.W.U. (American Mail Line)*, 144 N.L.R.B. 1432, 1441 (1963).

Brady and Jones were parties to the coastwide PMA-Longshoremen agreement. The Longshoremen claimed that, under that agreement, they were entitled to the work. That is what the arbitration was about.

The fact that the Engineers were not a party to the arbitration does not undermine the validity of the award. The purpose

of the arbitration was to decide upon the meaning of the agreement, and therefore the only logical or necessary parties to the arbitration were the parties bound by it, the Longshoremen and the PMA, acting for Brady and Jones. The arbitration resulted in an interpretation of the contract that bound the parties to the contract. There was no legitimate ground for the Board's refusal to accept the parties' own interpretation of their contract.

We are not bound to accept the Board's construction of a contract when it is not supported by substantial evidence or when it is not legally correct. *NLRB v. Southern Calif. Dist. Council of Laborers*, 9 Cir., 1971, 443 F.2d 220. We conclude that the PMA-Longshoremen contract did assign the disputed work to the Longshoremen and that the Board's finding of fact to the contrary is incorrect.

This conclusion has a bearing upon the Board's other findings of fact. In its opinion the Board failed to give weight to the factor of employer preference, yet the employers' representative, PMA, has vigorously urged the vindication of the Longshoremen's claim. Furthermore, since the inception of the work stoppage, Brady-Hamilton and Jones have at all times assigned the crane operation to the Longshoremen, which supports PMA's contention that the employers prefer that the Longshoremen be awarded the work.

In response to this contention the Engineers point out that before the work stoppage the employers had always assigned the work to the Engineers. However, as we have noted, this work assignment was made pursuant to the employers' lease agreement with the owners of the cranes. It was made by the then owners of the cranes, not by Brady and Jones, the employers here involved. Ever since the employers have had the contractual freedom to make their own crane operation work assignment, they have given this work to the Longshoremen.

The foregoing discussion points out two significant facts. First, this work dispute does not involve an employer caught in a cross fire between two unions with which the employer has contracts. Rather, only one union has a contractual claim to this work.[2]

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[2]In an ambiguous passage, the Board's decision quotes the barge crane owners' labor agreement with the Engineers without drawing any conclusion about its effect. To the extent that the Board relied upon this

Second, the employers, once free from the lease agreement which permitted the barge owners to designate Engineers to do the work, have behaved continually in a manner consistent with the conclusion that they prefer the assignment of the work to the Longshoremen.

The Board's misconstruction of the contract may also have led to a misplaced emphasis on the factors of skill, efficiency and safety. The purpose of the PMA-Longshoremen mechanization agreement was to allow the employers to introduce new machinery while preserving the Longshoremen's right to fill all available jobs. Therefore, one of the employers' express obligations under the agreement was to train the Longshoremen to safely and efficiently perform all work covered by the contract. In its §10(k) opinion the Board noted that such training commenced after the work stoppage. If the Board had correctly determined that the contract covered the disputed work it might have given weight to the fact that the skill problem was anticipated by the agreement.

Perhaps more significantly, by determining that the PMA-Longshoremen contract did not bear upon the work dispute, the Board ignored the efforts of labor and management to provide for a peaceful and stable method of resolving labor crises caused by technological advancement. In its past decisions, the Board has been more responsive to these efforts. It has treated the very PMA-Longshoremen contract before us as persuasive evidence that the factor of industry practice favored a work assignment to the Longshoremen. In fact, the Board has praised this contract and has consistently shown deference to it. In *United Industrial Workers of North America (Albin Stevedore Co.)* 182 N.L.R.B. 633, 636 (1970), after determining that the collective bargaining contracts and Board certification were not controlling the Board stated:

> "The trend in the maritime industry for the past decade has steadily been toward the replacement of manual labor by mechanized equipment. This reality was recognized early by

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contract to hold that either the factors of collective bargaining contracts or employer preference favored the Engineers, the Board's reliance was misplaced. That agreement did not bind either Brady or Jones or the Longshoremen, and therefore has no bearing upon this jurisdictional dispute.

> parties concerned with shipping on the West Coast of the United States and it culminated in 1961 with the West Coast Longshore Agreement executed by the Pacific Maritime Association . . . and various craft unions. The primary aim of that agreement was to lighten the impact of unemployment upon longshoremen due to mechanization and thereby promote industrial peace in this area of American industry. The Board has recognized the soundness of this objective and indeed relied upon its as a factor favoring longshoremen in the hammerhead crane case even though that dispute also involved the Seafarers, which is not a signatory to the agreement, and the Alaskan port, which is not covered by the agreement.
>
> We see no reason to deviate from implementation of the above policy in this case, . . . we find that industry practice favors the longshoremen."

See also *United Industrial Workers of North America, (Sea Land Service Co.)* 188 N.L.R.B. 241 (1971); *United Industrial Workers (Albin Stevedore)* 162 N.L.R.B. 1005 (1967); *ILWU (Howard Terminal)* 147 N.L.R.B. 359 (1964); *ILWU (American Mail Line)* 144 N.L.R.B. 1432 (1963); *ILWU (PMA)* 137 N.L.R.B. 119 (1962). But see *ILWU (Matson Terminals)* 140 N.L.R.B. 449 (1963); Atleson, The NLRB and Jurisdictional Disputes: The Aftermath of CBS, 53 Geo. L.J. 93, 133-34 (1964).

The Board did attempt to distinguish the above cited cases. However, the Board's misconstruction of the PMA-Longshoremen contract may have caused the Board to fail to find that industry practice favored the Longshoremen.

In sum, while many of the Board's findings of fact are supported by substantial evidence, the Board's erroneous finding or conclusion about the applicability of the PMA-Longshoremen contract casts doubt upon the validity of the Board §10(k) decision. We must decide whether the Board's fact finding errors undermine its §10(k) decision to the extent that the work assignment must be rejected as arbitrary and capricious.

Arbitrary and Capricious Standard

The Board's authority to resolve jurisdictional disputes derives from the Taft-Hartley Act. However, from 1947 until 1961, the

Board had a firm policy not to compel an employer to assign particular work to employees represented by one union rather than another, unless the employer's assignment was in violation of a Board order, certification or collective bargaining contract. In *CBS, supra,* the Supreme Court put an end to this administrative policy by requiring that the Board make affirmative work awards in all genuine jurisdictional disputes.

One of the Board's reasons for its reluctance to intervene in jurisdictional disputes was that §10(k) set forth no standards to guide it in resolving these disputes. The Court responded that it had faith in the Board's ability to overcome this handicap.

> "It is true that this forces the Board to exercise under §10(k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned to the Board." *(CBS, supra,* 364 U.S. at 583.)

Almost fourteen months after *CBS,* the Board came down with its first §10(k) decision under its new mandate. *Int'l Ass. of Machinists, Lodge 1743 (J. A. Jones Construction Co.)* 135 N.L.R.B. 1402 (1962). Once again the Board emphasized the difficulty of its task.

> "Section 10(k) of the Act contains no standards to aid the Board in determining jurisdictional disputes. It says only that the Board is to 'hear and determine' the dispute. The legislative history is equally lacking in indication of standards." (*Jones, supra,* 135 N.L.R.B. at 1410-11.)

The Board also stated that it was not going to establish any §10(k) decisionmaking standards until it had gained a sufficient amount of the experience that the Supreme Court had referred to in *CBS*.

> "At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g. the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot at this time establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. *It may be that later, with more experience in concrete cases, a measure of weight can be accorded the earlier decisions.*" (*Jones, supra,* 135 N.L.R.B. at 1410, emphasis added.)

Though the Board has subsequently resolved hundreds of §10(k) disputes, it has never altered its position nor reevaluated its decisionmaking process. In fact, as we observed earlier, the form of these decisions as well as the decisions' reliance upon the "entire record and . . . all relevant factors" rarely deviate from a fixed pattern.

As might be expected, given the uncertainty surrounding the Board's basis for decisionmaking, the Courts of Appeals have been reluctant to deny enforcement to Board orders stemming from §10(k) proceedings. We have been able to find only fourteen reported cases decided since *CBS* and *Jones* in which circuit courts have reviewed the merits of a §10(k) decision.[3] In each

[3] *Local 134, International Brotherhood of Electrical Workers v. NLRB,* 7 Cir., 1973, 486 F.2d 863; *NLRB v. International Longshoremen's and Warehousemen's Union,* 9 Cir., 1969, 413 F.2d 30; *NLRB v. Int'l Die Sinkers' Conference, Milwaukee Lodge,* 7 Cir., 1968, 402 F.2d 407; *NLRB v. Local 25, International Brotherhood of Electrical Workers,*

of these cases, the Board's work award was sustained, as the Courts of Appeals have granted the Board broad leeway in carrying out its *CBS* mandate.

The arbitrary and capricious standard has been applied in a manner that has led us, along with our sister circuits, to defer to the Board's judgment both in the creation of and implementation of §10(k) decisionmaking standards.

> "The broad scope of the Board's functioning in section 10(k) proceedings is outlined in [*CBS*]. Under this section, Congress has committed to the Board a task which requires the exercise of a wide degree of discretion and its special expertise. Among other things, the Board considers skills and work involved, certifications by the Board, company and industry practice, agreements between unions, and between employers and unions, the awards of arbitrators, the assignments made by the employer, and the efficient operation of the employer's business." *(NLRB v. Teamsters, Chauffeurs, Warehouse & H. Loc., U.*, 9 Cir., 1968, 403 F.2d 667, 673.)

The Third Circuit has stated that "it is the function of the Board and not this court to consider the relevant factors and to weigh and evaluate the evidence adduced with respect to each." *NLRB v. Local 825, International Union of Operating Engineers, supra*, 326 F.2d at 218. And the Eighth Circuit has agreed:

> "It is settled, however, that the Board's area of discretion in disposing of §10(k) controversies is wide and, indeed, 'involves of necessity a large measure of informed discretion.'

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2 Cir., 1968, 396 F.2d 591; *NLRB v. St. Louis Printing Pressmen & Assistants Union No. 6, Inc.*, 8 Cir., 1967, 385 F.2d 956; *NLRB v. International Longshoremen's and Warehousemen's Union*, 9 Cir., 1967, 378 F.2d 33; *NLRB v. Local 676, Int'l Bro. of Teamsters, etc.*, 3 Cir., 1967, 376 F.2d 3; *New Orleans Typographical Union No. 17 v. NLRB*, 5 Cir., 1966, 368 F.2d 755; *NLRB v. Local 1291, International Longshoremen's Association*, 3 Cir., 1966, 368 F.2d 107; *NLRB v. Denver Photoengravers' Union No. 18*, 10 Cir., 1965, 351 F.2d 67, *NLRB v. Local 1291, International Longshoremen's Association, AFL-CIO;* 3 Cir., 1965, 345 F.2d 4; *NLRB v. International Brotherhood of Electrical Workers*, 2 Cir., 1964, 339 F.2d 145; *NLRB v. Local 991, International Longshoremen's Association*, 5 Cir., 1964, 332 F.2d 66; *NLRB v. Local 825, International Union of Operating Engineers*, 3 Cir., 1964, 326 F.2d 218.

> [T]he Board is thus free to resolve these matters on a case-by-case basis where experience and common sense are important factors." *NLRB v. St. Louis Pressmen & Assistants Union No. 6, Inc., supra,* 385 F.2d at 960 (per Blackmun).

The Fifth and Seventh Circuits have also agreed: "We agree with the Third and Fifth Circuits that where the Board has made its determination on the totality of factors involved, the award should not be disturbed." *NLRB v. Int'l Die Sinkers Conference Milwaukee Lodge, supra,* 402 F.2d at 411.

In general terms, the Courts of Appeals have also approved the Board's reliance upon such varied criteria as skill, custom, efficiency, economy and past practice. See, e.g., *NLRB v. Local 25, International Brotherhood of Electrical Workers, supra,* 396 F.2d at 594; *NLRB v. Denver Photoengravers' Union No. 18, supra,* 351 F.2d at 70-71. More significantly for the present controversy, the Third, Fifth and Eighth Circuits have all specifically approved the Board's position that collective bargaining contracts are only one factor among many to be considered in resolving jurisdictional disputes.[4] *NLRB v. St. Louis Pressman & Assistants Union, supra,* 385 F.2d at 961; *New Orleans Typographical Union #17 v. NLRB, supra,* 368 F.2d at 763; *NLRB v. AFL-CIO, supra,* 345 F.2d at 10.

Our study of the Board's numerous §10(k) awards persuades us that in some respects its decisions can be characterized as both arbitrary and capricious. Many commentators have examined the Board's 10(k) decisions and have been dismayed by the Board's failure to articulate any decisionmaking standards.[5] One observer complained that the "criteria have been shuffled and shifted to justify . . . a pre-ordained result."[6] The conclusions of the American

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[4] *See ILWU (Matson Terminals)* 140 N.L.R.B. 449, 455 n.6 (1963); *ILA (Pa. Sugar Div.)* 137 N.L.R.B. 1458, 1465 (1962).

[5] See, e.g., Cohen, the NLRB and Section 10(k): A Study of the Reluctant Dragon, 14 Lab. L.J. 905, 918 (1963); Collister, Standards for Assignment of Work in Jurisdictional Work Disputes, 33 U.M. Kan. City L. Rev. 35, 58 (1965); O'Donoghue, Jurisdictional Disputes in the Construction Industry Since CBS, 52 Geo. L. J. 314, 358 (1963).

[6] Atleson, The NLRB and Jurisdictional Disputes: The Aftermath of CBS, 53 Geo. L. J. 93, 150. One isolated though conspicuous example of this phenomenon was the Board's divergent treatment of the factor of wage scale differences among competing unions in *United Bro'hood*

Bar Association's special §10(k) committee were even more critical:

> "Due to the lack of proper guideposts, the complexity of the problem, the multiple criteria employed and the variance in the weights accorded such criteria, the Board, since the *CBS* decision, has accomplished little other than to inject additional doubt and uncertainty into an already troublesome and difficult area of labor relations." (Supplementary Report of the Special 10(k) Committee 439 (1964).)

Since its *Jones* decision, the Board has consistently maintained that its policy in making §10(k) work awards is to decide each case on its own merits without announcing any standards or principles which govern the decisions that are made. Such a practice has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards. Such a practice makes life easy for the Board's Trial Examiners or Administrative Law Judges, and for the Board itself. To call the practice a policy, however, is a misnomer. It is a little like making a bouillabaisse or pot au feu. Various ingredients go into the pot and are stirred and simmered, and no matter what they are, or what quantity or quality of each is used, the product is always the same—a bouillabaisse or a pot au feu. Nobody can dispute the conclusion; nobody can say, except as a matter of personal taste, whether the result is good or bad.

While the practice may be easy and comfortable for the Board, it makes judicial review virtually impossible, because the decision is totally unprincipled. There is no way for the reviewing court to determine what principles, if any, led to the decision. When the Board lays the stew before the court, its position is essentially this: "We have put in everything relevant, we have stirred the mixture, and this is the result. Whether you like it or not, you must accept it, because we, not you, are the experts. The Supreme Court told you that in *CBS*. Who are you to say that we are not?"

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of Carpenters and Joiners of America, Local 171 (Knowlton Const. Co.) 207 N.L.R.B. No. 57 (1973) and in *Sheet Metal Workers Int'l Ass., Local 553 (Ray Proof Corp.)* 198 N.L.R.B. No. 36 (1972).

We do not think that the Congress or the Supreme Court intended that judicial review should be such a paper tiger. Since *CBS* the Supreme Court has not had occasion to review the Board's §10(k) decisionmaking process, though it has reiterated that it is the Board's duty to make affirmative work awards. *NLRB v. Plasterers' Union, supra, 404 U.S.* at *131*. Most of the circuit court decisions cited above involved the review of §10(k) decisions that were made within a few years after *CBS* and *Jones*. The courts could be expected to give greater deference to Board decisions during the period in which the Board's decisionmaking process was developing. The time has come, however, for the Board to accord a measure of weight to its past decisions and to establish some rational principles governing the weight that it gives to the various factors it considers in §10(k) hearings. In short, there is need for a good recipe for the stew.

We do not doubt the Board's ability to make principled decisions in this area. It has successfully done so in other areas in which the law also gives it wide discretion. It can do so here if it will. We think that it must. Its prior decisions in §10(k) cases can give some guidelines.

Most observers who have systematically studied the Board's §10(k) decisions agree that the Board's statement that no factor is necessarily more important than any other is simply false. Our own independent review of the Board's §10(k) decisions reveals that the commentators are correct in concluding that the Board's work award coincides "in virtually every case" with the employer's preference.[7] Moreover, the Board's consistent reliance upon employer preference is not the only observable decisionmaking pattern. Whenever the Board determines that a collective

[7]C. Morris, *The Developing Labor Law*, 1972 Supplement at 136 (1972). This is a consistent occurrence despite the Board's protestations that employer preference is only one factor among the many to be considered. See *Local 38, IBEW (Cleveland Illuminating Co.)* 137 N.L.R.B. 1719, 1722 (1962). Every survey undertaken of Board §10(k) decisions bears out this conclusion. See Atleson, *supra*, note 6 at 117, 151-52; Collister, *supra*, note 5 at 57-58; Gitlow, Technology and NLRB Decisions in Bargaining Unit and Jurisdictional Dispute Cases, 16 Lab. L. J. 731, 745 (1963); Johns, *supra*, at 52; O'Donoghue, *supra*, note 5 at 314; Note, Jurisdictional Disputes Since the CBS Decision, 39 N.Y.U. L.Rev. 657 (1964); ABA Section of Labor Relations Law: Report of the Committee on Development of Law under NLRA, 1964 at 124; 1965 at 445; 1967 at 99; 1968 at 110; 1970 at 97.

bargaining contract clearly and unambiguously binds an employer to one (and only one) union, then that union is almost invariably awarded the work.[8]

We do not quarrel with the Board's consistent reliance upon employer preference, collective bargaining contracts and to a lesser degree other factors. More often than not, other factors deemed relevant by the Board, such as skill, efficiency, safety and employee integration, are factors that the employer himself has relied upon in making his work assignment.[9] Indeed, though the Board purports to rely upon its own evaluation of factors such as skill, efficiency and safety, it is often apparent that the employer's evaluation of these factors influences the Board.[10] Furthermore, by giving significant weight to the employer's preference, the Board anticipated the Supreme Court's recognition of the critical stake that the employer has in the outcome of jurisdictional disputes. See *NLRB v. Plasterers' Union, supra*, 404 U.S. at 124-25, 130. In deferring to clearly and unambiguously applicable collective bargaining agreements, the Board also promotes the policies of the Taft-Hartley Act. By recognizing the importance of collective bargaining agreements, the Board enables union and management to provide for the stable and predictable settlement of labor disputes, through arbitration and otherwise. See *Id.* at 133, 136-37; *Carey v. Westinghouse*, 1964, 375 U.S. 261, 266.

What we do object to is the Board's refusal to acknowledge the extraordinary importance of these two factors in its §10(k) decisionmaking process. As we have said, the failure of the Board to establish any standards precludes viable judicial review. The case before us is a good example of the problems created by standardless decisionmaking.

The Board's work award to the Engineers conflicts with two of the factors that the Board often relies upon. It is possible, of course, that the Board may think that the Engineers should get

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[8]See generally surveys *supra* note 7 and cases cited therein. The Board has a firm policy that collective bargaining contracts will be deemed persuasive in §10(k) hearings only if they clearly and unambiguously assign the work. See *37th Annual Report of the NLRB for the Year Ending June 30, 1972* at 124.

[9]See Johns, *supra*, at 52-53.

[10]See, *e.g.*, *Local 10, Bricklayers, Masons, Plasterers, Marble, Tile and Terrazo Workers (Unistress Corp.)* 198 N.L.R.B. No. 67 (1972).

the work despite the PMA-Longshoremen contract and the employers' preference. On the other hand, the Board may determine that in light of the correct interpretation of the contract, the factors of skill, efficiency, safety, acquiescence and past practice are not controlling. Our reversal of the Board's conclusion as to the applicability of the contract precludes us from sustaining the Board's work assignment in this case. The Board must be given the first opportunity to use its accumulated expertise and make a principled rather than an arbitrary award of the work in light of the correct construction of the contract.

In exercising this discretion, it will not suffice for the Board again to merely list the relevant factors and then come to a conclusion without explaining why it comes to that conclusion. The Board must explicitly recognize that it has traditionally given importance to such factors as employer preference and collective bargaining contracts, absent countervailing circumstances, in its past decisions. In doing so, a body of precedent will be (and in reality has been) developed from which intelligible decision-making standards will emerge. The Board may still evaluate each jurisdictional dispute on its own merits and it need not be limited by a rigid set of standards or principles. But when the Board decides that certain factors take precedence over others, it must explain why and reconcile its decisions with its past judgments. Otherwise, §10(k) will not bring the desired stability to the process by which jurisdictional disputes are resolved, and the courts will be unable to determine whether or not the Board's decisions are arbitrary and capricious.

In this case the only applicable collective bargaining agreement assigns the disputed work to the Longshoremen. The employers also appear to prefer that the work assignment go to the Longshoremen. In light of the Board's policy of giving controlling weight to these factors under similar circumstances, we are unable to conclude, absent convincing reasoning from the Board to the contrary, that the Board's work assignment to the Engineers is not arbitrary and capricious.

In No. 72-1908, the Board's petition for enforcement is denied. In Nos. 72-2263 and 72-2315, the petitions for review are granted, the Board's order is set aside, and the case is remanded to the Board for further proceedings consistent with this opinion.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 9-9-74—480

APPENDIX

181 NLRB No. 51 D-3708
Portland, Ore

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN'S
& WAREHOUSEMEN'S UNION, LOCAL NO. 50

and Case 36-CD-54

HOISTING AND PORTABLE ENGINEERS,
LOCAL NO. 701, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO

and

BRADY-HAMILTON STEVEDORE COMPANY
AND WILLAMETTE-WESTERN CORPORATION

INTERNATIONAL LONGSHOREMEN'S
& WAREHOUSEMENT'S UNION, LOCAL NO. 50

and Case 36-CD-54-2

HOISTING AND PORTABLE ENGINEERS
LOCAL NO. 701, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO

and

W. J. JONES & SON, INC. AND
GENERAL CONSTRUCTION COMPANY

HOISTING AND PORTABLE ENGINEERS
LOCAL NO. 701, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO

and Case 36-CD-55

PACIFIC MARITIME ASSOCIATION

DECISION AND DETERMINATION
OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of charges in Case 36-CD-54, on April 3, 1969, and in Case 36-CD-54-2, on April 23, 1969, by Hoisting & Portable Engineers Local No.701, International Union of Operating Engineers, AFL-CIO, herein called Engineers; and in Case 36-CD-55 on April 21, 1969, by Pacific Maritime Association, herein called PMA. Brady-Hamilton Stevedore Company, herein called Brady, and Willamette Western Corporation, herein called Willamette, are the co-employers involved in Case 36-CD-54; and W. J. Jones & Son, Inc., herein called

Jones, and General Construction Company, herein called General, are the employers involved in Case 36-CD-54-2. The charges allege that International Longshoremen's & Warehousemen's Union Local No. 50, herein called Longshoremen, and Engineers, violated Section 8(b)(4)(D) of the Act. Pursuant to notice, a hearing in the consolidated proceeding was held on June 3, 4, 5, 6, 9, 10; July 7, 8, 9, 10, and 11; and August 4, 5, 6, 7, and 8, 1969, in Portland, Oregon, before Richard V.Stratton, Hearing Officer.[1/] Brady, Jones and PMA, the Longshoremen, and the Engineers appeared at the hearing, and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to adduce evidence bearing on the issues. The Unions and PMA filed briefs with the

1/ General and Willamette made no appearance at the hearing and took no official position.

National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing, and finds that they are free from prejudicial error. They are hereby affirmed. Upon the entire record in this case, the Board makes the following findings:

I. The Business of the Companies

PMA, a California corporation, is an association of steamship and stevedoring companies engaged in, among other things, the handling of cargo in and out of vessels and barges at ports on the West Coast. Brady and Jones are stevedore companies with main offices in Portland, Oregon, performing services in Astoria, Oregon. Both are members of PMA. It was

stipulated that Jones, Brady and PMA on behalf of its employer-members, each annually perform stevedoring services for shipping companies sailing in intercoastal or international waters valued in excess of $50,000, and that said shipping companies annually do a gross volume of business in excess of $500,000.

General and Willamette are employers engaged in the construction industry with offices in Portland, Oregon. Each annually conducts business outside the State of Oregon in excess of $50,000.

We find, accordingly, that the Employers are engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that the Engineers and the Longshoremen

are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. The Work in Dispute

The dispute concerns the work of operating barge-mounted floating whirly-type steam cranes in the Port of Astoria, Oregon, lifting bundles of logs, weighing from 25 to 45 tons each, from the water and placing them into the hold of a ship or barge. There are two jobs involved, the crane operator's job and the fireman's or engineer's job.

B. The Facts

The Unions claiming the work described above are the Engineers and the Longshoremen. From 1947 to 1964, only the Engineers loaded logs in Astoria, Oregon, using a locomotive crane. From 1964 until April 3, 1969, only the Engineers loaded logs in Astoria, using floating cranes. Prior

to the introduction of floating cranes in 1964, Astoria had been considered a depressed port. Since then, the loading of logs at Astoria, for shipment primarily to Japan, has rapidly increased. To expedite the loading operation, the stevedore companies, Brady and Jones, leased waterborne whirly cranes from Willamette and General. These cranes were leased complete with operator and fireman, all of whom were members of the Engineers. The Longshoremen raised no jurisdictional claim until an unrelated dispute in Portland brought the matter of the manning of the cranes to the fore. Then, on April 3, 1969, the Longshoremen struck the Port of Astoria demanding that the work of operating the floating cranes be taken away from the Engineers and given to them. The stevedore companies who were members of PMA which had a contract with the Longshoremen up and

down the West Coast, then assigned the work to the Longshoremen. A subsequent arbitration award between Longshoremen and PMA, to which the Engineers was not a party, confirmed that action.

Although most of the Longshoremen had experience operating ships' winches, none had any experience operating a floating crane. Nevertheless, some were put to work operating these cranes without any training. Others were given a half day to 4 days' training, with a half day classroom instruction, under a training program instituted after April 3 by PMA and the Longshoremen.

After the adverse arbitration award, the Engineers demanded that the stevedore companies assign the work back to them. In furtherance of this demand they picketed the Port of Astoria, from April 22, 1969, until they were enjoined by the U.S.

District Court for the District of Oregon.

Several months after the assignment of work to the Longshoremen, not all of the floating cranes were back in operation, and some of the log loading usually done by the cranes was being done by ships' winches while the PMA-Longshoremen training program continued.

C. Contention of the Parties

PMA and its members Brady and Jones take the position that the work should be assigned to the Longshoremen both by virtue of its relation to the normal waterfront longshore work and because the work allegedly is covered by a Board certification and by the labor agreement between PMA and Longshoremen. The Engineers claim that they have been doing the work for the past 5 or 6 years, that it is covered by the Engineers' contract to which Willamette and General are parties and

that Engineers possess superior skill in operating cranes, and perform the work in a more economical and a safer manner. The Longshoremen, however, claim that they are equally skilled in the operation of cranes, operate them as safely or more safely, and that the work involves cargo loading which is traditionally their work. They also claim prior 10(k) awards covering the same or similar work.

D. Applicability of the Statute

Before the Board proceeds with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. As stated above, the uncontroverted record testimony establishes that the Longshoremen engaged in a work stoppage bringing the log-loading operation in Astoria to a complete halt. It is further

established that the object of this conduct was to force the stevedore companies to assign the work of operating the floating cranes to them rather than to the Engineers. It is also established that the Engineers, who were discharged when the work was reassigned to the Longshoremen, picketed the Port of Astoria in furtherance of their demand that it be assigned back to them. Accordingly, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) of the Act has occurred, and that the dispute is properly before the Board for determination under Section 10(k) of the Act.

IV. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various relevant factors. 2/

2/ N.L.R.B. v. Radio Television Broadcast Engineers Union Local 1222, International

Traditionally, members of the Longshoremen have engaged in loading and unloading cargo at ports on the West Coast and other ports of the United States. 3/ However, members of the Engineers, not the Longshoremen, have always from 1964 until April 1969 operated the floating cranes in Astoria, and the Longshoremen have long acquiesced in this assignment. Prior to 1964, Astoria was a depressed port. From

Brotherhood of Electrical Workers (Columbia Broadcasting System), 364 U.S. 573; International Association of Machinists, Lodge No. 1743, AFL-CIO (J.A. Jones Construction Co.), 135 NLRB 1402, 1411.

3/ See General Truck Drivers, Chauffers, Warehousemen & Helpers, Local 270 (W.L. Richeson & Sons, Inc.), 166 NLRB No.115; International Longshoremen's and Warehousemen's Union and Local 4, International Longshoremen's and Warehousemen's Union (Aluminum Company of America), 158 NLRB 1024; International Longshoremen's Association, Great Lakes District, AFL-CIO, and International Longshoremen's Association, Local 2000, AFL-CIO (Lawrence Erie Company), 158 NLRB 1687

1946 to 1964, there was only one locomotive crane loading cargo and logs, which was always and solely operated by members of the Engineers. From the time the floating cranes first came to Astoria in 1964 until April 3, 1969, when the Longshoremen struck the port, the floating cranes were always operated by the Engineers.

PMA and the Longshoremen claim that the work in dispute is covered by a certification, based on Ship Owners' Association of the Pacific Coast, et al., 7 NLRB 1002, a 1938 case in which the Board certified the alleged predecessor of the Longshoremen as the representative of "the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of" specified employer associations allegedly the predecessors of PMA. However, that certification was issued before the advent of the barge-

mounted floating crane. In addition, the record shows that all post-certification contracts between those parties and their successors limited the broad language of the certification by excluding some work from the unit covered. Recent PMA-Longshoremen contracts provide that "All machinery, equipment, and other tools now or hereafter used in moving cargo shall be operated by longshoremen when used in an operation covered by this Agreement and the operation thereof is assigned to longshoremen and is covered by this Agreement," with certain exceptions. One of the exceptions specified is the operation of cranes mounted on floating crane barges. Moreover, PMA has heretofore contended at all times that a floating crane is not a longshoremen's tool.

On the other hand, the labor agreement between the Engineers and Willamette and

General includes under Article II, "Work Affected Defined," the following language:

> ...including operation, maintenance, and repair of land and floating plant equipment, vehicles and other facilities used in connection with the described work and services, and all other work of similar nature.

The Longshoremen's claim that they are equally skilled in the operation of these cranes as the Engineers appears to be without foundation. On April 3, 1969, there were 11 operators and 10 firemen, members of the Engineers, working the floating cranes in Astoria. Each was a skilled craftsman with up to 6 years of training and experience on land and floating cranes, having served long apprenticeships as firemen before becoming operators. The record also reveals without contradiction that on April 3, 1969, there was no member of the Longshoremen who had ever operated either a floating or a land crane, with the exception of one who had operated

a land crane for 2 days. No Longshoremen had any experience firing the boilers of these steam cranes. At the present time, while the floating cranes are being operated by members of the Longshoremen, the stevedore companies are forced to hire outside repairmen at considerable expense to maintain the floating cranes, since the Longshoremen firemen, unlike the firemen members of the Engineers, are unable to do so, having had no experience in maintaining, servicing or rebuilding cranes. Although, there are in evidence 22 reports of accidents occuring during the 5 years that the Engineers operated the floating cranes in Astoria, no accidents could be attributed to their negligence. However, since April 3, with fewer cranes in operation, manned by the Longshoremen, a boom has been bent, a window in a main enginehouse broken, a barge's torque converter has

been damaged, and a load dropped, all of which may be attributed to crane operations.

Prior Board cases [4/] in which the Longshoremen claim they were awarded the same or similar type of work are distinguishable. These prior cases did not involve floating cranes, but rather various types of land cranes, which require much less experience, skill and delicacy of touch and feel. Moreover, they did not involve specific work which, over the course of a number of years, had continuously and consistently been performed by employees represented by another labor organization. The work in dispute is just such work.

In light of the above, we conclude that

4/ United Industrial Workers (Albin Stevedore), 162 NLRB No. 96; ILWU (Howard Terminals), 147 NLRB 359; ILWU (Albin Stevedore), 144 NLRB 1443; ILWU (American Mail Line), 144 NLRB 1432; ILWU (Pacific Maritime Association), 137 NLRB 119.

the relevant factors support the Employers' original assignment of this work to employees represented by the Engineers, and that the employees are entitled to the disputed work. We shall therefore determine the dispute in their favor.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following determination of dispute:

1. Employees who are currently represented by Hoisting and Portable Engineers Local No. 701, International Union of Operating Engineers, AFL-CIO, are entitled to perform the work of operating barge-mounted floating whirly-type cranes lifting bundles of logs from the water and

placing them into the holds of ships and barges at Employers' Astoria, Oregon, operations.

2. International Longshoremen's & Warehousemen's Local No. 50 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employers to assign the above work to longshoreement represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Longshoremen's & Warehousemen's Local No. 50 shall notify the Regional Director for Region 36, in writing, whether it will or will not refrain from forcing or requiring the Employers, by means proscribed by Section 8(b)(4)(D) to assign the work in dispute to longshoremen, rather than to employees of the Employers who are represented by Hoisting and Portable

Engineers Local No. 701, International
Union of Operating Engineers, AFL-CIO.
Dated, Washington, D.C. 2/26/70

Frank W. McCulloch, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION AND NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Employer Respondents in Opposition

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January 15, 1974

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner*

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Employer Respondents in Opposition

The opinion of the Court of Appeals for the Ninth Circuit, dated August 29, 1974, is reported at 504 F. 2d 1209. It is printed in the appendix to the petition (Pet. Apx. 1a-19a). The Decision and Determination of dispute under § 10(k) by the National Labor Relations Board is reported at 181 NLRB 315.[1] The Board's order dated July 24, 1970,

1. Petitioner cites the Board's order as 181 NLRB 51. It is No. 51 in that volume and is printed at pages 315-317.

denying the Petition for Rehearing and the Petition for Reconsideration, is unreported. It is printed in the appendix hereto (PMA Apx. 1-3). These two orders are referred to herein as "the § 10(k) order". The Board's subsequent order that an unfair labor practice occurred is reported at 193 NLRB 266. It is printed in the appendix hereto (PMA Apx. 4-5). The trial examiner's decision is printed in the appendix hereto (PMA Apx. 6-37).

JURISDICTION

The judgment of the Court of Appeals was entered on January 13, 1975. It is printed as a Supplementary Appendix hereto, under the cover hereof. The petition for a writ of certiorari was filed on November 27, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, et. seq., herein "the Act", are set out in the body of the petition, 5-6.

STATEMENT

This petition arises out of a jurisdictional dispute as to whether waterfront employers, members of Pacific Maritime Association (PMA), should use longshoremen or operating engineers to man floating cranes when the PMA member uses this type of hoisting gear to load logs aboard ship. Until the sixties, logs were hoisted by conventional ship's gear. Longshoremen always did the hoisting work, being employed under the terms of the PMA's contract with the International Longshoremen's and Warehousemen's Union (ILWU).

The operating engineers involved in this dispute normally work in heavy construction. They are represented by Local 701 of the International Union of Operating Engineers (Local 701), which has contracts with members of the Associated General Contractors (AGC). The owners of the floating cranes here involved are AGC heavy construction contractors. The operating engineers claiming this work have at all times worked under Local 701 contracts with the AGC for the heavy construction industry and at all times were paid in accordance with those contracts by the AGC heavy construction contractors owning the cranes.

Local 701 has at no time had any collective bargaining relationship or contract with any PMA member.

The longshoremen claiming the work are the employes of PMA members. They are represented by the ILWU. In 1938, the ILWU was certified to represent the workers doing longshore work, including the loading of logs aboard ship, for PMA members in California, Oregon and Washington, *Shipowners Association of the Pacific Coast*, 7 NLRB 1002 (1938).

PMA and the ILWU have carried on collective bargaining since the certification in 1938. Their contract assigns the work in dispute to longshoremen employed under the ILWU-PMA contract. It provides a grievance machinery leading to arbitration, and includes a no-strike clause with an exception permitting longshoremen to engage in a work stoppage if they in good faith believe that they are being ordered to work in a way that will immediately endanger their safety. The ILWU-PMA contract further provides that this work stoppage exception shall not be used as a "gimmick" to assert any other grievance.

The work in dispute was assigned to the longshoremen as required by the ILWU-PMA contract.

In 1959 and 1960 PMA and the ILWU reached agreement on a radically new collective bargaining principle for "modernization and mechanization" of the longshore industry. It was agreed that the waterfront employers could bring new labor-saving mechanized equipment into use and that the contract provisions interfering in their economic use would be eliminated. As part of the "quid pro quo" for this concession, the PMA companies agreed that longshoremen would not be displaced by outsiders, but would operate all new equipment brought in and that the employers would provide the necessary training to enable them to do so safely, skillfully and efficiently.

By 1962 it had become apparent that this modernization and mechanization program would frequently lead to the replacement of conventional handling gear by cranes. In these circumstances the ILWU and PMA adopted a Crane Supplement to their contract on August 10, 1962. It stated that certain cranes were "longshore cranes" and must be operated by longshoremen. It stated that floating cranes were not "longshore cranes", but the Joint Coast Committee was given authority to place them in this category through joint action in the contract's administrative and grievance machinery.[2] Up to 1962, the floating cranes were used rarely and only for short periods of time to hoist extremely heavy loads. As a result, no longshoremen were displaced by the use of nonlongshoremen in manning the floating cranes.

In the sixties a new mechanized technique for loading log ships came into use. Large prepackaged loads of logs (25 to 35 tons) were brought alongside the ship and hoisted by floating cranes. This became a standard longshore pro-

2. The Joint Coast Labor Relations Committee is the top level bipartite agency for administering the contract and dealing with grievances for the California, Oregon and Washington "coast unit".

cedure, replacing the procedure under which individual logs were made up into loads at shipside and hoisted by the ship's cargo-hoisting gear. Thus the longshoremen who had manned the ship's gear under other loading techniques were displaced by the persons manning the floating cranes. Accordingly, the Joint Coast Committee agreed to a modification of the Crane Supplement so as to make floating cranes "longshore cranes" and to require that they be operated by longshoremen. This carried out the fundamental agreement in the basic 1959-1960 settlement to permit technological advance. Thereafter, longshoremen manned the floating cranes in loading logs except in one port.

At Astoria, Oregon, the PMA longshore employers used floating cranes obtained under time charter from heavy construction contractors, who supplied their construction workers represented by Local 701 as their crews to man the cranes. These crews' wages, hours and conditions were governed by the AGC contracts with Local 701. The ILWU locals and the PMA individual employers at Astoria understood that floating cranes could not be obtained under bare-boat charter at Astoria. Thus, they assumed that the AGC contractor would not charter his floating crane except with a construction worker crew aboard it.

On April 3, 1969, the Astoria longshoremen demanded that the PMA longshore employers comply with the ILWU-PMA contract promise that longshoremen shall be used, and shall be trained to the extent necessary, to operate floating cranes in any new cargo handling technique in which longshoremen are displaced, such as in loading log ships. The Astoria longshoremen raised this claim by a safety work stoppage. PMA and its members involved filed grievances attacking this procedure as a "gimmick" safety

stoppage. The ILWU responded by asserting the excuse that the contract clearly required the use of longshoremen to operate the floating cranes in Astoria log-loading. Although the PMA members immediately put longshoremen to work hoisting the logs by use of ship's gear, they pressed their grievance in accordance with the PMA policy of acting firmly to prevent the use of "gimmick" safety work stoppages to support other grievances.

These issues were taken to the arbitrator, Sam Kagel. He ruled that the Astoria local had breached the contract by a "gimmick" safety work stoppage, that the employers had been in breach of the contract's provisions that assigned to longshoremen the operation of floating cranes in any recurring longshore operation that reduced the work opportunities of the longshoremen who otherwise would operate the hoisting gear, that the Astoria log ship loading was such a recurring longshore operation, and that this employer breach did not justify the work stoppage.

Since April 3, 1969, all floating cranes used in hoisting logs out of water to shipboard in Oregon have been manned by longshoremen working under the ILWU-PMA contract and represented by the ILWU (Pet. Apx. 9a).

Over the objections of the employers, the Board gave Local 701 the privilege of picketing to get the work in dispute assigned to those it represents for collective bargaining.

In April, 1969, Local 701 picketed the PMA waterfront employers, including the terminal in Astoria at which the logs were being loaded when the jurisdictional dispute became acute. Local 701 also filed an unfair labor practice charge alleging that the work stoppage of the Astoria ILWU local had violated § 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D). PMA filed a charge that Local 701's picket-

ing violated the same subsection of the Act. The Labor Board proceeded under § 10(l) of the Act, 29 U.S.C. § 160(l), to get an injunction against both unions.

A hearing officer of the Board held a 16-day hearing under § 10(k) of the Act, 29 U.S.C. § 160(k). A three member panel of the Board considered the record of 2,582 pages and 228 exhibits. On February 26, 1970, this panel issued a Decision and Determination, 181 NLRB 315 (Pet. Apx. 20a). This order concludes, at p. 317, with a declaration that the operating engineers are entitled to man the cranes and that the ILWU may not use § 8(b)(4) economic force to force or require the cranes to be manned by longshoremen (Pet. Apx. 37a-38a).

Petitions for rehearing and reconsideration were filed by PMA and the ILWU. On July 24, 1970, these were denied. The order noted that two of the five Board members would grant the petitions (PMA Apx. 2).

Further administrative action occurred. The Board dismissed PMA's charge against Local 701 (PMA Apx. 10, n. 5). It held a hearing under § 10(c) of the Act, 29 U.S.C. § 160(c), on the substance of Local 701's charge against the Astoria ILWU local. It held, in its § 10(c) order, that the longshoremen's work stoppage was an unfair labor practice under § 8(b)(4)(D) because Local 701 had won the § 10(k) case (PMA Apx. 9, 28-29, 33-34).

The court of appeals set aside the Board's § 10(k) order.

Three actions were instituted in the Ninth Circuit. The Board sought to enforce its § 10(c) order. The ILWU sought review of the § 10(c) order and the underlying § 10(k) order. The PMA sought review of the § 10(k) order. After argument, the court denied enforcement, set aside the order and remanded the case to the Board (504 F.2d at 1222, Pet. Apx. 19a).

The court first considered the § 10(k) order in the light of the substantial evidence rule. It found several deficiencies, to-wit: The Board's holding that the ILWU-PMA contract did not assign the work in dispute to the longshoremen was not supported by substantial evidence (Pet. Apx. 6a-9a). Contrary to the Board's usual practice in § 10(k) orders, this order made no mention of the factor of employer preference although there was substantial evidence in the record as to this factor (Pet. Apx. 5a-6a, 9a-10a, 17a, 19a). The Board's failure to find, as requested by PMA and the ILWU, that the employer preference was to use longshoremen, was not supported by substantial evidence (Pet. Apx. 9a-10a). The opinion also stated that these errors suggest that the reasons for them may have been responsible for findings against the longshoremen in regard to other factors (Pet. Apx. 9a-11a).

The court then turned to the question of whether the Board's fact finding errors "undermine its § 10(k) decision to the extent that the work assignment must be rejected" (504 F. 2d at 1217, Pet. Apx. 11a). It held that the Board's erroneous conclusion as to the ILWU-PMA contract precluded enforcement of the order under review. In addition, it held that the Board's "standardless decisionmaking" in this case precluded viable judicial review and hence precluded judicial enforcement of its § 10(k) order.

The court's evaluation of the Board's § 10(k) adjudicative process was explained in detail. It paid heed to the judgments of writers in the law journals and to the conclusions of a special § 10(k) committee of the American Bar Association. It made its own study of the § 10(k) process from 1960, when Mr. Justice Black read the opinion of the unanimous Court in *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212 (CBS)*, 364 U.S. 573 (1960).

The opinion reports, "Many commentators have examined the Board's 10(k) decisions and have been dismayed by the Board's failure to articulate any decisionmaking standards." (Pet. Apx. 15a). It finds that the Board has consistently maintained "that its policy in making 10(k) work awards is to decide each case on its own merits without announcing any standards or principles which govern the decisions that are made" (Pet. Apx. 16a). The opinion states that this "practice has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards", thus making "judicial review virtually impossible, because the decision is totally unprincipled" (Pet. Apx. 16a). It also found that the Board's decisionmaking process was "more obtuse than usual in the § 10(k) case under review" (504 F. 2d at 1213, Pet. Apx. 5a).

Despite the Board's habit of adumbration, the court stated that its study confirmed the conclusions of the commentators that two decisionmaking patterns can be discerned: First, the Board has consistently assigned the work in dispute in accordance with the employer's preference, if there be one (Pet. Apx. 17a). Second, it has consistently assigned the work in accordance with the contract requiring the employer to use one of the groups claiming the work, if there be one and only one such contract (Pet. Apx. 18a). The court also confirms the conclusion of the commentators "that the Board's statement that no factor is necessarily more important than any other is simply false" (504 F. 2d at 1220, Pet. Apx. 17a).

The court recognizes that a period of faint images and shadowed reasoning was acceptable in the beginning.[3] But

3. Section 10(k) was enacted in 1947. The incident giving rise to this Court's *CBS* opinion occurred ten years later in 1957. The *CBS* opinion was filed in 1960. The charge giving rise to this petition was filed ten years later in 1970.

it went on to say, 504 F. 2d at 1220, 1221 (Pet. Apx. 17a, 18a):

> "The time has come, however, for the Board to accord a measure of weight to its past decisions and to establish some rational principles governing the weight that it gives to the various factors it considers in § 10(k) hearings. * * *
>
> "As we have said, the failure of the Board to establish any standards precludes viable judicial review. The case before us is a good example of the problems created by standardless decisionmaking."

The opinion below then deals with the specifics of the § 10(k) order under review (504 F. 2d at 1221, 1222, Pet. Apx. 19a):

> ". . . Our reversal of the Board's conclusion as to the applicability of the contract precludes us from sustaining the Board's work assignment in this case. . . .
>
> "In this case the only applicable collective bargaining agreement assigns the disputed work to the Longshoremen. The employers also appear to prefer that the work assignment go to the Longshoremen. In light of the Board's policy of giving controlling weight to these factors under similar circumstances, we are unable to conclude, absent convincing reasoning from the Board to the contrary, that the Board's work assignment to the Engineers is not arbitrary and capricious."

The court simply holds (1) that the Board must proceed on the basis of findings supported by substantial evidence and (2) that it must follow its established precedents or explain why it does not do so.

ARGUMENT

1. Issues as to whether findings of the Board are supported by substantial evidence and as to whether any un-

supported finding is of significance are left in the hands of the courts of appeal. This Court stated in *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951) at 502, 503:

> "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. . . .
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."

The same rule is set forth in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) at 490-491.

The court of appeals applied the substantial evidence standard in accordance with the normal and usual practices of the courts of appeals. It considered the evidence supporting the finding and that detracting from the finding. This is required by *Universal Camera, supra*, 340 U.S. 474 (1951). This Court stated, 340 U.S. 474 at 487-488:

> "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

There is no need for this Court to reconsider either of these principles. There is no reason to disturb the conclusions below that there was not substantial evidence to support either the Board's failure to find that the ILWU-PMA

contract included the post-1962 terms assigning the work in dispute to the longshoremen or the Board's failure to find that the employer preference was that longshoremen do the work. The case was properly remanded to the Board for further action on the basis of the court's opinion with respect to the Board's findings.

2. The holding of the court below that the Board's order was obtuse and did not set out the grounds upon which it reached its decision provides no basis for a writ. The applicable rule of administrative law was applied in *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954). This Court set aside an Interstate Commerce Commission order authorizing certain charges. The opinion by Mr. Justice Frankfurter explained, at 652-654:

> ". . . (W)hile the Commission has adumbrated the reasons that commended these charges to its approval, the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision. . . .
>
> "In short, the Commission has not explained its decision 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude. . . .'"

Mr. Justice Cardozo had previously stated the underlying principle in *United States v. Chicago, Milwaukee, S. P. & P. R. Co.*, 294 U.S. 499, at 511 (1935):

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

This rule of law applies to the Board. In *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177 (1941), this Court stated at 196-197:

> "From the record of the present case we really cannot tell why the Board has ordered reinstatement of the strikers who obtained subsequent employment. . . . The

> administrative process will best be vindicated by clarity in its exercise. . . . [I]t will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. . . ."

This rule has been consistently followed by this Court. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Burlington Truck Lines, Inc., et al. v. United States*, 371 U.S. 156, 167, 168 (1962); *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968); *NLRB v. Metropolitan L. Ins. Co.*, 380 U.S. 438, 442-444 (1965).

These cases cover a broad spectrum of administrative action. They clearly establish that a well-accepted rule of law, repeatedly set forth in the opinions of this Court, required the court of appeals to refuse to enforce the Board's § 10(k) order in view of the lack of articulated reasons to disclose the basis for the order. There is no need for this Court to issue another opinion stating this rule.

3. The Court of Appeals was on equally sound footing in holding that the Board reached the wrong conclusion as to the meaning of the ILWU-PMA contract. It noted that PMA and the longshoremen argued "that the agreement must be read in light of the interpretation given to it by the parties" (Pet. Apx. 7a). This Court stated in *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960):

> "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."

In *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960), this Court stated, "Gaps may be left to be filled in . . ." by grievance machinery action during the contract term. The Coast Committee's action as to floating cranes filled such a gap.

The Board, however, considered only the bare words in the 1962 Crane Supplement. It refused to consider the evidence that the Joint Coast Committee, after 1962, put floating cranes into the "longshore crane" category in accordance with the power it had and to meet the development of mechanization techniques. The court of appeals reached the proper construction of the ILWU-PMA contract on the basis of all the evidence in the record.

The court's opinion also points out (Pet. Apx. 7a-8a) that an award of the ILWU-PMA arbitrator held that the ILWU-PMA contract assigns the work in dispute to the longshoremen. The court held that the Board erred in ignoring this award. There is no room for argument as to the rule of law that this Court has held is governing in these circumstances. *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960), states at 567-569:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. * * *
>
> ". . . When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal."

A federal administrative agency has an equal obligation to pay heed to the function of the grievance machinery, which is "a vehicle by which meaning and context are given to the collective bargaining agreement".[4]

---

4. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960).

4. This Court's opinion in *NLRB v. Plasterers' Union Local No. 79 (Plasterers)*, 404 U.S. 116 (1971), does not overrule this principle that the arbitrator, not the court, is to decide any question as to the meaning of the contract. *Plasterers* involved a different question, i.e., whether an agreement to arbitrate the work assignment issue had been reached that would abort the Board's § 10(k) procedure. This Court held that the § 10(k) procedure is aborted only if there is agreement among the two unions and the employer that they will dispose of the dispute through arbitration.

The court of appeals correctely distinguished *Plasterers* because it did not involve a question as to the construction of a contract (Pet. Apx. 8a-9a).

The issue before the Board, and the court of appeals, was whether the ILWU-PMA contract assigns the work to the longshoremen. The Board held that it does not. The court of appeals, the arbitrator, and the parties in their Joint Coast Committee procedure for the administration of the contract and the adjudication of grievances (and before the Board and in court), were all in agreement: the ILWU-PMA contract does assign the work to the longshoremen. There is no reason why this Court should be asked to adjudicate this question of contract construction. Such questions can be safely left in the hands of the courts of appeals.

5. Petitioner misreads *CBS (NLRB v. Radio and Television Broadcast Engineers Union Local 1212)*, 364 U.S. 573 (1960). Petitioner claims that *CBS* directs the Board to use "experience and common sense" like a jury, without developing any principles, policies, practices or precedents in § 10(k) cases (Pet. 31). It bases this claim on a sentence in the *CBS* opinion, 364 U.S. at 583:

> "Experience and common sense will supply the grounds for the performance of this job [of deciding which group of employees involved in a jurisdictional dispute should be assigned the work]."

This statement was made in response to the Board's claim that it should not be assigned this job because of "lack of standards" in the statute. The *CBS* opinion states that the Board should develop grounds on the basis of experience and common sense, not that it should make ad hoc work assignments and proceed without standards.

The courts of appeal have the statutory duty to review the orders of the Labor Board. To do so the court must be able to determine whether the Board's "conclusions rest on erroneous legal foundations". *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *NLRB v. Brown*, 380 U.S. 278, 292 (1965). To do so, the court must be informed of the grounds of the Board's decision.

6. The court of appeals did not usurp the Board's function of making § 10(k) work assignments. It remanded the case to the Board for further proceedings under § 10(k). Compare *Spitzer Akron, Inc. v. NLRB*, 504 F.2d 28 (6th Cir., 1974). True, the court's opinion requires the Board to accept the conclusion that the ILWU-PMA contract assigns the work to the longshoremen, to give consideration to the employer preference factor and to the evidence showing that the employer prefers to have the longshoremen do the work, to receive the evidence on other factors, and to follow its established policies and precedents or provide "convincing reasoning" as to its "departure from prior norms". Thus, the record would appear to permit no lawful order but one assigning the work to the longshoremen. However, the opinion states, 504 F.2d at 1221, Pet. Apx. 19a: "The Board must be given the first opportunity to use

its accumulated expertise and make a principled rather than an arbitrary award of the work in light of the correct construction of the contract."

CONCLUSION

The opinion below is based on principles long settled in this Court and on a routine exercise of the duty of the courts of appeal to review Labor Board orders, to-wit: to determine whether there is substantial evidence to support the findings, to determine whether the decision rests on "erroneous legal foundations", and to grant or deny enforcement in accordance with law. The writ should be denied.

Respectfully submitted,

RICHARD ERNST

Counsel for the Employer Respondents
Pacific Maritime Association,
Brady-Hamilton Stevedore Co.,
Jones-Oregon Stevedoring Co.

January 15, 1975

Supplementary Appendix

JUDGMENT

Before: MERRILL and DUNIWAY, Circuit Judges, and TAYLOR,* District Judges.

The above consolidated causes came on to be heard upon the application for enforcement and on petitions for review of an order of the National Labor Relations Board dated September 21, 1971, against International Longshoremen's and Warehousemen's Union, Local No. 50, its officers, agents, and representatives. The Court heard argument of respective counsel on November 12, 1973, and has considered the briefs and transcript of record filed in these causes. On August 29, 1974, the Court being fully advised in the premises, handed down its opinion granting the petitions for review, denying enforcement of, and setting aside the Board's Order and remanding the case to the Board for further proceedings consistent with its opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that enforcement of the order of the National Labor Relations Board directed against International Longshoremen's and Warehousemen's Union, Local No. 50, its officers, agents, and representatives, be and it hereby is denied.

Endorsed, Judgment Filed and Entered
JAN 13 1975

/s/ Emil E. Melfi
Emil E. Melfi
Clerk
[A TRUE COPY
ATTEST:
S. A. White, Deputy
Emil E. Melfi
Clerk]
/s/ S. A. White

SO ORDERED:
/s/ BEN C. DUNIWAY
/s/ CHARLES MERRILL
/s/ FRED M. TAYLOR

*The honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

SUPREME COURT, U. S

JAN 16 19

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION AND NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appendix to Brief in Opposition for Pacific Maritime Association Brady-Hamilton & Stevedore Co. Jones-Oregon & Stevedoring Co.

RICHARD ERNST
P.O. Box 26314
635 Sacramento Street
San Francisco 94126

January 15, 1974

SORG PRINTING COMPANY OF CALIFORNIA. 346 FIRST STREET. SAN FRANCISCO 94105

Appendix

United States of America
Before the National Labor Relations Board

International Longshoremen's & Warehousemen's Union, Local No. 50 and Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO	Cases 36-CD-54
and	
Brady-Hamilton Stevedore Company and Willamette-Western Corporation International Longshoremen's & Warehousemen's Union, Local No. 50 and Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO	36-CD-54-2
and	
W. J. Jones & Sons, Inc. and General Construction Company Hoisting and Portable Engineers Local No. 701, International Union of Operating Engineers, AFL-CIO and Pacific Maritime Association	36-CD-55

ORDER

On February 26, 1970, the National Labor Relations Board issued its Decision and Determination of Dispute[1]

1. 181 NLRB No. 51.

in the above-entitled proceeding in which it determined that employees who are currently represented by Hoisting and Portable Engineers Local No. 701, International Union of Operating Engineers, AFL-CIO, are entitled to perform the work of operating barge-mounted floating whirly-type cranes lifting bundles of logs from the water and placing them into the holds of ships and barges at the Employers' Astoria, Oregon, operations; and that International Longshoremen's & Warehousemen's Local No. 50 is not entitled by means proscribed by Section 8(b)(4)(D) of the National Labor Relations Act, as amended, to force or require the Employers to assign such work to longshoremen represented by it.

Thereafter, on March 9, 1970, the Employers, Pacific Maritime Association and its stevedore members, Brady-Hamilton Stevedore Co., and W. J. Jones & Son, Inc., filed a Petition for Rehearing before the Full Board on the Issues Involved in the Order of February 26, 1970 and for Oral Argument. They also filed a brief in support thereof, alleging errors of fact and law in said Decision and Determination of Dispute, and requesting reconsideration thereof. On March 13, 1970, Local No. 50 filed a Petition for Reconsideration and Clarification of Decision and Determination of Dispute, and thereafter filed a supporting brief. Local No. 701 filed a brief and a reply brief in opposition to the aforesaid Petitions; and a Motion to Strike Briefs of International Longshoremen's Union, Local No. 50 and Pacific Maritime Association or in the Alternative Those Portions of the Briefs which Misstate the Facts. The Employers and Local 50 filed a response in opposition to the Motion to Strike.

The Board has duly considered the matter and denies[2] the Petitions filed by the Employers and Local No. 50 be-

2. Members McCulloch and Brown would grant the Petitions filed by the Employers and Local No. 50.

cause the matters contained therein are lacking in merit. In these circumstances, the Motion filed by Local 701 is also denied as no prejudice to that Union will result therefrom. Accordingly,

It Is Hereby Ordered that the Petition filed by Pacific Maritime Association and its stevedore members, Brady-Hamilton Stevedore Co. and W. J. Jones & Son, Inc.; the Petition filed by International Longshoremen's & Warehousemen's Union, Local No. 50; and the Motion filed by Hoisting and Portable Engineers Local No. 701, International Union of Operating Engineers, AFL-CIO, be, and they hereby are, denied.

Dated, Washington, D. C., July 24, 1970.

By direction of the Board:

Robert Volger
Associate Executive Secretary

193 NLRB No. 37 D—5549 Astoria, Oreg.

United States of America
Before the National Labor Relations Board

International Longshoremen's and Warehousemen's Union, Local No. 50 (Brady-Hamilton Stevedore Company and Willamette Western Corporation) and Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO	Case 36-CD-54
International Longshoremen's and Warehousemen's Union, Local No. 50 (W. J. Jones & Son, Inc. and General Construction Company) and Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO	Case 36-CD-54-2

DECISION AND ORDER

On April 13, 1971, Trial Examiner James T. Barker issued his Decision in the above-entitled consolidated proceeding, finding that Respondent Union had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and a supplement to exceptions, the Intervenor[1]

1. Pacific Maritime Association and its members Brady-Hamilton Stevedore Company and W. J. Jones & Son, Inc.

filed exceptions to the Trial Examiner's Decision, with supporting briefs, and the Charging Party filed a brief supporting the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, briefs, and entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, International Longshoremen's and Warehousemen's Union, Local No. 50, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C. Sep 21 1971

Edward B. Miller, *Chairman*
John H. Fanning, *Member*
Howard Jenkins, Jr., *Member*
National Labor Relations Board

(SEAL)

TXD-(SF)-33-71
Portland, Oreg.

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Branch Office
San Francisco, California

International Longshoremen's and Warehousemen's Union, Local No. 50 (Brady-Hamilton Stevedore Company and Willamette Western Corporation) and Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO	Case No. 36-CD-54
International Longshoremen's and Warehousemen's Union, Local No. 50 (W. J. Jones & Son, Inc. and General Construction Company) and Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO	Case No. 36-CD-54-2

Jerome F. McCarthy, Esq., of
Seattle, Wash., for the
General Counsel.

Willner, Bennett & Leonard, by
Lillian Meyers, Attorney, and
Don S. Willner, Esq., of
Portland, Oreg., for the Charging Party.

Gladstein, Leonard, Patsey &
Andersen, by Norman Leonard, Esq.,
of San Francisco, Calif., for
the Respondent.

Ernst & Daniels, by Richard Ernst, Esq.,
of San Francisco, Calif., for the Intervenor.

TRIAL EXAMINER'S DECISION

Statement of the Case

JAMES T. BARKER, Trial Examiner: This matter was heard at Portland, Oregon, on January 14 and 15, 1971, pursuant to separate charges filed by Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO, hereinafter called Operating Engineers, in Cases Nos. 36-CD-54 and 36-CD-54-2, respectively. The charge in the first designated case was filed on April 8, 1969, by the Operating Engineers, and the charge in the latter case was filed on April 23, 1969. On October 8, 1970, the Acting Regional Director of the National Labor Relations Board for Region 19 issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing alleging that International Longshoremen's and Warehousemen's Union, Local 50, hereinafter called Respondent, the Longshoremen, or Local 50, was engaging in conduct in violation of Section 8(b)(4)(i)(D) of the National Labor Relations Act, as amended, hereinafter called the Act. Thereafter, on November 9, 1970, the Regional Director of the National Labor Relations Board for Region 19 issued an amendment to the consolidated complaint alleging that Respondent was engaging in conduct violative of Section 8(b)(4)(i)(ii)(D) of the Act.

The Respondent timely filed an answer to the consolidated complaint and to the amendment to the consolidated complaint. The parties and the Intervenor timely filed briefs with me on March 5, 1971.[1]

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1. Pursuant to a pretrial motion which was granted by Trial Examiner James R. Webster, the Pacific Maritime Association, Brady-Hamilton Stevedore Company and W. J. Jones & Son, Inc., were permitted to intervene in the proceedings and were represented at the hearing by counsel.

Upon consideration of the briefs and upon the entire record in this case,[2] I make the following:

Findings of Fact

I. Jurisdictional Facts

Willamette Western Corporation, hereinafter called Willamette, and General Construction Company, hereinafter called General, are engaged in the construction industry and annually conduct business outside the State of Oregon in excess of $50,000. Brady-Hamilton Stevedore Company, hereinafter called Brady, annually performs stevedoring services for shipping companies sailing in intercoastal or international waters valued in excess of $50,000 and said shipping companies annually have a gross volume of business in excess of $500,000. W. J. Jones & Son, Inc., hereinafter called Jones, is an Oregon corporation engaged in the performance of stevedoring services for shipping companies operating in interstate or in foreign commerce. Jones annually performs stevedoring services for shipping companies sailing in intercoastal or international waters valued in excess of $50,000, and said shipping companies annually do a gross volume of business in excess of $500,000.

Pacific Maritime Association, hereinafter called PMA, is a California corporation admitting to membership employers engaged in shipping, stevedoring, and terminal business at ports in California, Oregon, and Washington. Among its members are Jones and Brady. PMA was established and exists, *inter alia*, for the purpose of negotiating

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2. At the hearing the Trial Examiner ruled that the record in the Section 10(k) proceeding and the Board's Decision and Determination of Dispute, reported at 181 NLRB No. 51, would constitute part of the record in the instant case.

collective-bargaining agreements with unions on behalf of its employer-members.

Upon these stipulated and/or admitted facts, I find that at all times material herein Willamette, General, Jones, Brady, and PMA have been, and are, employers within the meaning of Section 2(2) of the Act and have been, and are, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Hoisting and Portable Engineers, Local 701, International Union of Operating Engineers, AFL-CIO, and International Longshoremen's and Warehousemen's Union, Local No. 50, are stipulated and/or admitted to be labor organizations within the meaning of Section 2(5) of the Act, and I so find.

III. The Unfair Labor Practices

A. *The Issues*

The General Counsel, resting on the Section 10(k) record, contends that the evidence adduced at that hearing, cognizable in this Section 10(c) proceeding, constitutes substantial, preponderating evidence in support of the unfair labor practice allegations of the complaint; and asserts that findings of Section 8(b)(4)(i)(ii)(D) violations on the part of Respondent should be made by the Trial Examiner.

The Respondent and Intervenor raise several procedural defenses, and the Respondent contends that, even assuming rejection of these defenses, the record contains no evidence of conduct on the part of Respondent violative of Section 8(b)(4)(ii)(D) of the Act.

In substance, the Respondent and Intervenor contend, (1) that the notice of hearing should be quashed and the complaint herein dismissed because the procedures followed by the Board for resolving jurisdictional disputes fail to conform to the mandate of the statute, and do not conform to the statutory procedures which were given delineation by the U. S. Supreme Court in the *CBS* case;[3] (2) that the Board's Decision and Determination of Dispute herein is legally deficient in that the Board failed to render a binding and compulsory determination of the dispute and/or to obtain compliance therewith;[4] (3) that the notice of hearing herein should be quashed and the instant proceeding be postponed until an amended complaint based upon the charges in Case No. 36-CD-55[5] is issued consolidating that case with those presently before the Trial Examiner in the instant proceeding so that, with Local 701 joined as a respondent with Local 50 in a Section 10(c) proceeding, a resolution can be reached concerning the disputed work assignment and a record made upon which an orderly review of the Board's decision could be

3. *N.L.R.B. v. Radio and Television Broadcast Engineers Union (CBS)*, 364 U. S. 573.

4. A consequence of this failure, contends the Intervenor, is to leave the Longshoremen free to use lawful means to enforce its contractual rights to the work and thus to subject the employers to "anarchy" arsing from the Board's asserted failure to issue a binding award of the work and to take steps under Section 10(c) to enforce the award.

5. That case involved a charge filed by PMA, the Intervenor herein, on April 22, 1969, alleging violations of Section 8(b)(4)(i)(ii)(D) arising from picketing engaged in by Local 701 of the Operating Engineers, at the Astoria, Oregon facilities which had the purpose and object of forcing PMA to assign the work of driving cranes to its members rather than to registered longshoremen working under the ILWU-PMA Pacific Coast contract who were at that point in time allegedly doing the work. The picketing was enjoined and the charge was dismissed by the Regional Director of Region 19 on July 28, 1970.

perfected;[6] (4) that the record of the Section 10(k) proceeding should be struck and/or not considered in this Section 10(c) proceeding on the merits of the alleged unfair labor practice conduct, in that Section 102.92 of the Board's Rules and Regulations, Series 8, as amended, is "in violation of the law" and for the further reason that consideration in this Section 10(c) proceeding of evidence adduced in a Section 9 "type" hearing deprives the moving parties of due process of law;[7] (5) that the Board procedure which treats its Decision and Determination of Dispute issued pursuant to a Section 10(k) proceeding as binding and conclusive in a Section 10(c) proceeding involving a purported violation of Section 8(b)(4)(D) of the Act is similarly deficient in legality and in meeting due process requirements; (6) that for this latter reason it was error for the Trial Examiner at the instant hearing to reject evidence of the existence of an outstanding certification giving Local 50 jurisdiction over the disputed work and evidence allegedly establishing the existence of collective-bargaining agreements between the ILWU and PMA giving employees represented by Local 50 the right to perform the disputed work; (7) that the Trial Examiner erred in rejecting evidence revealing that the work of loading logs at Astoria has since April 1969 been satisfactorily performed by longshoremen in that the evidence rejected

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6. The Intervenor contends, in apparent departure from the position of the Respondent on this motion, that the charges in each of the three aforesaid related cases should be held in abeyance pending the issuance by the Board of a binding and compulsory determination of the work assignment dispute such as is envisaged by the statute and required by the *CBS* decision.

7. The Respondent and Intervenor contend that Congress intended Section 10(k) procedure to be special and unique and that in following Section 9 procedure in Section 10(k) hearings the Board errs.

related to a period subsequent to the Section 10(k) hearing and was thus not available for introduction at that hearing; and (8) the Board's Decision and Determination of Dispute was based upon errors of fact and of law.

B. *Pertinent Facts*

1. Background Facts

a. *The setting*

This case arises from a dispute between the Operating Engineers and the Longshoremen over the right to man barge-mounted floating whirly-type cranes used by stevedore companies in the Port of Astoria, Oregon, for lifting bundles of logs weighing from 25 to 45 tons from the water and placing them into the hulls of ships and barges. The whirly-type crane is manned by a crane operator and by a fireman or engineer. From 1964 until April 3, 1969, Operating Engineers had been used exclusively in operating the whirly-type crane.

To facilitate the log-loading operation at the Port of Astoria, Brady and Jones, stevedoring companies engaged in loading of logs in the Port of Astoria, Oregon, leased waterborne whirly-type cranes from Willamette and General. Under the separate lease arrangements with Brady and with Jones, Willamette and General, respectively, at times pertinent herein, provided the employees to operate the cranes. In accordance with the terms of a bare-boat charter, employees provided to Brady by Willamette are deemed to be the employees of Brady. All of the employees who, prior to April 3, manned the floating cranes for Brady and Jones were, as found, members of the Operating Engineers.

Immediately prior to April 3, 1969, the matter of manning the whirly-type floating cranes became an issue. As subsequently considered, on April 3 longshoremen refused

to perform certain work tasks essential to the log-loading process. Consequently, the loading process came to a halt. The whirly-type floating cranes were not thereafter manned by employees represented by the Operating Engineers. The stevedore companies then assigned the work of loading logs to longshoremen. This assignment was subsequently confirmed by an arbitration award arising from a proceeding to which the Longshoremen and PMA were parties. The Operating Engineers were not a party to this arbitration proceeding.

b. *The Section 10(k) Proceeding*

Pursuant to charges filed in the instant case, and to charges filed, as above noted, on April 22, 1969, by PMA in Case No. 36-CD-55, the aforesaid cases were consolidated and a notice of hearing was issued directing that a Section 10(k) hearing be conducted into the work assignment dispute.

In due course, a hearing was conducted pursuant to Section 10(k) of the Act. Thereafter, on February 26, 1970, the Board issued its Decision and Determination of Dispute wherein the Board found that employees "currently" represented by the Operating Engineers were entitled to perform the disputed work.

On March 6, 1970, Respondent filed a Petition for Reconsideration and Clarification of Decision and Determination of Dispute with the Board. On July 24, the Board issued an order denying Respondent's petition for reconsideration and subsequently PMA filed an application for stay with the Board. The application was denied on September 4, 1970.

The Respondent concedes that since on or about February 26, 1970, it has failed and refused to comply with the Board's Decision and Determination of Dispute.

2. The alleged unlawful conduct

a. *The refusal to perform log-loading tasks*

On the morning of April 3, Elwyn Ty Stanton, a floating crane operator in the employ of Willamette and a member of the Operating Engineers, reported to work at the Astoria docks. Stanton had been in the employ of Willamette for approximately eleven years and had worked at the Astoria docks for approximately five years. On April 3, as was usual procedure, upon reporting to work at approximately 8 a.m., Stanton went aboard his assigned crane which was situated on a floating barge. In accordance with normal practice, at approximately 8 a.m., on April 3, Stanton moved the boom of the crane over the water causing the slings which are attached to the end of the boom to drop in a position proximate to logs which were floating in the water. It is usual work procedure at this point in the work process for a hookup crew of four men—designated as raftmen—who are members of the Respondent Longshoremen to secure the slings at the end of the crane boom to logs situated in the water. In this manner through the use of the crane the logs are loaded in the hulls of ships and barges. When, on the morning of April 3, the slings were presented to the raftmen, unlike previous occasions in the work experience of Stanton, the raftmen did not secure the logs.

In a similar manner, on the morning of April 3, Stanton observed that the raftmen assigned to work with three other cranes of Willamette refrained from securing the logs when the slings were presented to them by the crane operators.

This condition of inactivity with respect to the four Willamette cranes persisted for approximately 30 minutes.

At this point in time, Dale Larson, a gear lockerman, employed by Brady, the lessee of the floating cranes, approached Stanton and seven other operators and engineers in the employ of Willamette.[8] Addressing Stanton and the seven other assembled crew members, Larson said, "You're fired; get your personal gear and get off." Larson added that longshoremen were going to operate the cranes.

Stanton and his coworker, Paul Bell, left and thereupon made telephone calls to Willamette and the Operating Engineers, respectively. Later in the morning, Stanton observed individuals whom he recognized as longshoremen operating the floating cranes. At approximately 1 p.m., engineers, who were members of the Operating Engineers, and who were normally employed on the crews which were manned by Operating Engineers, shut off the power which operated the floating cranes. It was the daily responsibility of the engineers employed on the crews to shut off the power at the end of their work shift.[9]

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8. Larson's job and responsibilities, at times pertinent herein, consisted, *inter alia*, of informing crane operators of Willamette as to the vessel on which they should work and as to the position on the vessel from which they should perform their work tasks. For a period of approximately three years prior to April 3, Larson had been transmitting instructions to Stanton, and Stanton had followed them. The testimony of Elwyn Ty Stanton and that of Norman Cass, equipment supervisor of Willamette, reveals that Larson, at times pertinent, possessed and exercised the authority of a supervisor within the meaning of the Act.

9. All of the foregoing is based upon the credited testimony of Elwyn Ty Stanton. With respect to the techniques employed in securing the logs of the hoisting gear and the findings concerning the role of longshoremen crews in carrying out or facilitating the hoisting procedure, I also rely upon the credited testimony of Bill Krohn. With respect to Stanton's testimony that he contacted Willamette on the morning of April 3 I have also considered the testimony of Norman Cass. Cass confirms that Stanton contacted him on April 3 and that he instructed him and the other operators to "hang tough" and, in substance, await developments. Cass recalled the call as occurring in the afternoon and not the morning

In like manner, upon reporting to work on the morning of April 3, Bill Krohn moved the hoisting gear of his floating crane over the logs situated in the water. This action conformed to Krohn's normal practice which he had followed during the four and a half years of his work experience as a crane operator in the employ of General at the Astoria docks. Krohn observed that the raftmen to whom he presented the slings made no effort to secure the logs. Consequently, he left the crane gear hanging over the logs for approximately 30 minutes. The raftmen continued to abstain from securing the logs. Thereupon, Krohn left the crane and proceeded to the dock. Upon arriving at the dock, he spoke with John Tyler, a superintendent of Jones, the Company for which Krohn was performing services under the crane lease arrangement between General and Jones. Krohn asked Tyler if he knew anything about what was happening. Tyler responded that he did not know but that he would make some calls and find out. Tyler added that he knew that, "(t)hey would not be using the General cranes on this ship."

Krohn did not thereafter operate a floating crane at the Astoria dock. Krohn observed that on April 3, four floating cranes of General were operative and that the hookup gear of each was extended over the floating logs in a manner permitting the raftmen situated on the logs to secure them for hoisting. Krohn further observed that, in each instance, raftmen refrained from securing the logs.

Krohn testified that, by reason of his prior work at the Port of Astoria, he was acquainted with the four raftmen

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as Stanton testified. However, Cass lacked certitude in this regard. I find that Stanton's accounting of the chronology was reliable and that he contacted Willamette in the morning. I conclude Cass was either mistaken as to the time of his conversation with Stanton or the Stanton-Cass conversation was in addition to the company contact to which Stanton testified.

working in the water on the morning of April 3, whose normal task it was to secure the floating logs to the slings affixed to the boom of the crane which he was operating. When the four raftmen failed to secure the logs for hoisting after the boom had been placed over the floating logs, Krohn called to the raftmen. He inquired, "what was taking place." The raftmen responded that they knew nothing and that they had just been told to stand by until further orders and not to hook up the logs.

At a subsequent point in time, prior to 9 a.m., Tyler again spoke with Krohn. Tyler instructed Jones to remove the cargo gear belonging to Jones from the floating cranes and prepare to be towed to dockside. Krohn transmitted these instructions to the other crane operators.

Because the tugboats necessary to tow the personnel and gear dockside were not available until approximately 2:30 p.m., Krohn remained on the floating cranes until the tugboats arrived. During the interim, Krohn observed longshoremen operating ships' gear endeavoring to load bundles of floating logs. Because of prevailing circumstances, these attempts were unsuccessful, but by a modified approach the longshoremen were successful in loading individual logs aboard the ship.

On April 3, Krohn and other personnel of General prepared the floating cranes for towing. On April 4, the cranes were towed approximately one mile upstream from the port dock area and were there moored. The crane personnel, exclusive of Krohn, completed the week doing maintenance work. Krohn remained at the Port of Astoria for approximately two weeks thereafter performing maintenance work on the cranes themselves.[10]

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10. The foregoing is based upon the credited testimony of Bill Krohn.

b. *Radovich and Niemi converse*

In the meantime, at approximately 8:15 a.m., on April 3, Stanley Radovich, a superintendent of Brady, who, at times relevant was the superintendent in charge of the Astoria stevedoring operations of Brady, spoke with Roy Niemi. Niemi was at that time a member of Respondent's labor relations committee. Radovich approached Niemi and asked Niemi why the longshoremen were not hooking on the logs. Niemi responded that the longshoremen felt it was unsafe in view of the hard feelings that existed between Local 701 and ILWU Local 50.[11]

c. *The joint telephone conference*

Thereafter, at approximately 8:30 a.m., on the morning of April 3, Donald Beal, labor relations administrator for PMA, participated with representatives of Respondent in what was essentially a conference telephone conversation of some one hour's duration. The telephone conversation was designated by the participants as a special meeting of the Astoria Joint Longshore Labor Relations Committee and conformed to procedures which were invoked by the participants in circumstances which necessitated immediacy of communication between the parties and which obviated travel between Astoria and Portland, Oregon. Don Beal, William Caruso and Bill Church, all of whom were representatives of PMA, participated in the telephone conference from Portland. James VanOsdol, Gordon Kluge and Glen Bird, all members of Respondent's labor relations committee spoke from Astoria. The basic telephone conversation between these parties was punctuated on occasions during the conversation with separate telephone conversa-

11. The foregoing is based upon the credited testimony of Stanley Radovich.

tions between the aforesaid participants and other individuals. These separate conversations were necessitated by issues which arose during the course of the basic dialogue and which related to the subject matter of the basic conversation.

Beal testified that he had learned from Will Sheahon, superintendent for Brady, and from William Caruso, superintendent for Jones, that a work stoppage had transpired at Astoria. He placed the conference telephone call and during the course of the conversation was informed by VanOsdol that the work stoppage had transpired because of difficulties between Local 701 and Local 50 which were in the nature of "jurisdictional warfare." Representatives of Local 50 asserted that the ILWU had recently experienced "severe jurisdictional difficulties with several craft unions" and particularly with Local 701. Respondent's representatives added that efforts to resolve these jurisdictional matters had been rejected and that Local 50 had been warned by the craft unions that they intended to expand their jurisdiction. In the course of the conversation, VanOsdol and Niemi stated that incidents had been reported in the Astoria area involving animosity between the two locals and that the animosity was a sufficient ground for Local 50 to consider it dangerous to the health and safety of its members to work under Local 701 crane operators. As a consequence, Beal was informed by VanOsdol and Niemi that the longshoremen were not going to work under Local 701 crane operators.

As a result of the discussions which took place, the parties to the conference telephone conversation agreed to submit to arbitration the question of whether "(t)he working conditions that exist aboard these vessels [from which the

floating cranes operated], as related to the use of nonlongshore crane drivers, are not unsafe."[12]

d. *The area arbitrator's decision*

In due course, on April 27, 1969, the area arbitrator issued a written decision in the matter. In pertinent part, the arbitrator's decision reads as follows:

> THE UNION'S POSITION
>
> It was the principal contention of the Union that they had recently experienced severe jurisdictional difficulties with several craft unions including Local 701—portable hoisting engineers. Repeated ILWU efforts to resolve these problems had been strongly rejected, and the craft unions had warned the ILWU that they intend to expand their jurisdiction on the waterfront.
>
> In view of this hostile atmosphere, the gangs assigned to these vessels stood by because the non-ILWU crane drivers represented an immediate danger to health and safety.

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12. The foregoing is based upon the credited testimony of Donald Beal. Received in evidence at the Section 10(k) hearing was a summary of the conference telephone conversation which transpird on April 3. This summary was prepared by Bill Church, a representative of PMA, from secretarial notes. There is no evidence to suggest that the summary, as prepared, was adopted or in any manner executed by representatives of Local 50. Beal testified that the summary constituted an accurate reflection of the conference conversations but his testimony on cross-examination reveals that the summary was, in fact, a refinement and interpolation of some aspects of the conversation. I rely upon the summary only to the extent that it is consistent with Beal's oral testimony, given at the Section 10(k) hearing. I specifically find, consistent with Beal's oral testimony and with a facet of the memorandum that during the conference conversations it was implied and discussed that Local 701 had made known to Local 50 its intention to expand its jurisdiction on the waterfront.

THE EMPLOYER'S POSITION

The Employers contended that since Local 701 crane operators had driven this equipment for years, have made no threatening remarks or gestures towards longshoremen, and their competency is not challenged, a real safety question does not exist under Paragraph 2.11 of Supplement III—Basic Agreement. Also, in the Employers' view, the basis of this dispute is jurisdiction—not safety—and work must continue under Section 1.52—PCLCD.

DISCUSSION

In the opinion of the Arbitrator, there could only be a condition involving health and safety in this series of operations if the nonlongshore crane operators were acting in a hostile or belligerent manner such as to create a dangerous working area for the longshore gangs. This not being the case, the operation is considered to be safe, and the Employers' Motion is sustained.

DECISION

The following oral decision issued to the parties is hereby confirmed:

1. This is a jurisdictional dispute.
2. There was no bona fide health and safety issue.
3. There shall be no payment for standby time.
4. The jurisdictional issue shall be referred to the Joint Coast Labor Relations Committee for resolution as required by the Pacific Coast Longshore Contract Document.

e. *The coast labor relations committee meets*

Thereafter, on May 8, 1969, the coast labor relations committee met at a conference attended by William Forrester, a representative of the Respondent, and by three employer representatives, B. H. Goodenough, John Fenton and J. J. O'Shea. The conference meeting was for the purpose of considering the decision of the area arbitrator which had been previously issued on April 27. The minutes of the meeting reveal that the Employers took the position that the Union was not entitled to raise a grievance as to a work assignment dispute through the use of the health and safety grievance procedure of the contract. The Employers took the further position that the merits of the work assignment dispute must be raised in accordance with the provisions of section 1.7 and 1.5 of the contract and not under the provisions relating to disputes on health and safety. The Employers further pointed out at the meeting that they had received demands concerning the work assignment from Local 701 and were apprised that the National Labor Relations Board had filed an injunction claiming that the Operating Engineers had an arguable position countering the position of Local 50 on the Astoria crane dispute. Consequently, the Employers requested at the meeting that there be an agreement that the use of "jurisdictional health and safety" is improper under the contract and that any grievances as to work assignments should be presented pursuant to section 1.52 of the contract. The minutes of the meeting reflect the position of Local 50 as articulated at the meeting as follows:

> The union's position is that even if the union was wrong in proceeding through the agreed procedure for disputes with respect to health and safety, that pro-

cedure, like the basic procedure, specifically provides that once the grievance machinery has been started the employers have a right only to continue work "in accordance with the specific provisions of the Agreement" if the matter "is covered by the Agreement", which is to use longshoremen on the Astoria water whirley [sic] cranes, and not to direct work to continue in any other way while the dispute continues.

The ILWU further asserts that it has been clearly established by the decisions of the Coast Committee interpreting the contract clauses, the contract clauses themselves, and the well established practice in the Columbia River Area, as shown by Portland and the facts stated in the affidavits submitted, that this work has been assigned to the longshoremen by the collective bargaining contract, that the longshoremen are entitled to this work in Astoria upon request, that a request was made for it, and that the longshoremen must be given this work and the employer was required to begin using longshoremen to do this work as soon as the grievance was mentioned. The requests from Local 701 must be denied.

f. *The coast arbitrator's decision*

The Joint Coast Labor Relations Committee, being unable at the meeting of May 8, to resolve the dispute before it, submitted the matter to the coast arbitrator on a joint motion of the parties. By decision dated May 8, 1969, Sam Kagel, coast arbitrator, pursuant to a proceeding to which the Operating Engineers were not a party and in which they did not participate, sustained the position of the ILWU to the effect that, "The PMA Employers were and are required to operate in accordance with the [ILWU-PMA] con-

tract, and specifically to use only longshoremen to operate floating whirly cranes in Astoria for loading logs . . ."

Conclusion

1. The procedural issues

The several procedural issues advanced by the Respondent and Intervenor for dismissing the instant complaint issued under Section 10(c) of the Act, or for otherwise quashing the notice of hearing herein, raise issues challenging in the most fundamental manner the legal propriety of the Board's procedures for resolving jurisdictional disputes under section 10(k) of the Act and for determining whether or not an unfair labor practice has been committed in violation of Section 8(b)(4)(D) of the Act. The foundation for these related proceedings is imbedded in the Rules and Regulations of the Board and in case precedent formulated by the Board in light of the decision of the Supreme Court in the *CBS* case.[13] Manifestly, for the Trial Examiner to rule favorably to the Respondent and Intervenor on the procedural issue which they have raised herein would require an exercise of discretion and amendatory authority which the Board has made clear is not his. I have carefully considered the motions and argument advanced by Respondent and Intervenor at the hearing, and I have similarly considered their respective briefs which renew the motions and amplify the supporting rationale therefor. In consideration

13. See, e.g., *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Co.)* 135 NLRB 1402, 1410-1411; *Local 991, International Longshoremen's Association, AFL-CIO, Etc. (Union Carbide Chemical Company)* 137 NLRB 750, 754-755; *Chicago Typographical Union No. 16, AFL-CIO (Central Typesetting and Electrotyping Co.)* 138 NLRB 231, 236-237. Section 102.89 *et seq.* of the Board's Rules and Regulations, Series 8, as amended.

thereof I find no warant in this proceeding for departing from established Board precedent and procedure.[14]

Encompassed within this conclusion which I reach is my rejection of the contention that the instant proceeding is rendered defective by the General Counsel's dismissal of the charge against the Operating Engineers, filed by PMA in Case No. 36-CD-55.[15] Similarly, I find without merit the assertion that factual distinctions attaching to two contentions raised by the Respondent and Intervenor render existing Board precedent inapplicable and leave the Trial Examiner free to dismiss the complaint. Initially, drawing upon the alleged viability of a Board certification in favor of the Respondent covering the disputed work, the Respondent and Intervenor contend that under the "unless"

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14. At the hearing the Respondent and Intervenor through offers of proof which were rejected by the Trial Examiner endeavored to establish, in support of their respective motions to dismiss and to quash the notice of hearing, (1) evidence of Board certifications and contractual commitments assertedly securing to the longshoremen the right to perform the disputed work; (2) arbitration awards supporting the claim of the longshoremen which were issued pursuant to the collective-bargaining agreements in effect between PMA and the Longshoremen; (3) the existence of an historical claim on the part of the longshoremen to the disputed work as well as a history of actual performance by the longshoremen of log-loading tasks through use of ships' gear, and otherwise, at the Port of Astoria, and at other West Coast ports; (4) a continuing and viable claim by the longshoremen to the disputed work; and (5) an awareness and recognition on the part of officials of PMA—assertedly possessive of the ultimate right to assign crane operators to tasks being performed by member stevedoring companies—of the contractual and certification-based right of the longshoremen to the disputed work. I affirm my rulings.

15. Section 3(d) of the Act; *United Brotherhood of Carpenters & Joiners of America, Local Union No. 978, AFL-CIO, et al. (Markwell & Hartz)* 120 NLRB 610, 612; *Division 1267, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Ordman*, 320 F.2d 729 (C.A.D.C.); *Balanyi v. Local 1031, International Brotherhood of Electrical Workers, AFL-CIO*, 374 F.2d 723 (C.A. 7).

clause of Section 8(b)(4)(D), a Board certification constitutes an absolute defense to the allegations of the instant complaint. Upon this premise, and analogizing the decision of the Board in *International Longshoremen's & Warehousemen's Union, et al., (United States Steel Corporation)* 153 NLRB 1363,[16] the Respondent and Intervenor contend that the Board has recognized that evidence of an effort on the part of the company to assign disputed work to a respondent union in whose favor a Board certification had issued is relevant and competent evidence in an unfair labor practice proceeding under Section 8(b)(4)(D), and that rejection of such evidence in an unfair labor practice hearing wherein a certification is raised as a defense is error. A companion consideration, not predicated upon the "unless" clause or upon the dictates of the *U. S. Steel* case, but logically and legally indistinguishable, contend Respondent and Intervenor, is the existence of viable collective-bargaining agreements between the signing employer and the contending, respondent union contractually entitled to perform the disputed work. On these bases, contend Respondent and Intervenor, the Trial Examiner should dismiss the complaint.

I find the *U. S. Steel* case to be inapposite and the contention of the Respondent and Intervenor with respect to the applicability of the certification and collective-bargaining agreements in the instant proceeding to be without merit. It is clear that in its Decision and Determination of Dispute in the Section 10(k) proceeding the Board con-

16. In *U. S. Steel*, in finding a violation of Section 8(b)(4)(D) flowing from a failure on the part of the respondent therein to conform to a Section 10(k) determination, the Board specifically observed that the respondent had raised no contention that in assigning the work to the employees represented by the respondent the company was failing to conform to any order or certification of the Board.

sidered and rejected the certification and contract contentions. Thus, the Board noted:

> PMA and its members Brady and Jones take the position that the work should be assigned to the Longshoremen both by virtue of its relation to the normal waterfront longshore work and because the work allegedly is covered by a Board certification and by the labor agreement between PMA and Longshoremen.
>
> * * *
>
> PMA and the Longshoremen claim that the work in dispute is covered by a certification, based on *Ship Owners' Association of the Pacific Coast, et. al.*, 7 NLRB 1002, a 1938 case in which the Board certified the alleged predecessor of the Longshoremen as the representative of "the workers who do longshore work in the Pacific Coast port of the United States for the companies which are members of" specified employer associations allegedly the precedessors of PMA. However, that certification was issued before the advent of the barge-mounted floating crane. In addition, the record shows that all post-certification contracts between those parties and their successors limited the broad language of the certification by excluding some work from the unit covered. Recent PMA-Longshoremen contracts provide that "All machinery, equipment, and other tools now or hereafter used in moving cargo shall be operated by longshoremen when used in an operation covered by this Agreement and the operation thereof is assigned to longshoremen and is covered by this Agreement," with certain exceptions. One of the exceptions specified is the operation of cranes mounted on floating crane barges.

In light of the foregoing evaluation, and after considering other evidence relevant to the assignment of the disputed

work, the Board found that employees represented by the Operating Engineers were entitled to the disputed work rejecting implicitly, if not explicitly, the contention of PMA and the Longshoremen with respect to the controlling nature of the certification and of the PMA-Longshoremen contract.

Also requiring delineation is the contention of the Respondent and the Intervenor that, in rendering its Decision and Determination of Dispute the Board failed, as required by *CBS* and the statute, to make a specific award of the disputed work. A careful reading of the Board's decision reveals that this contention is without merit. Thus, while refraining from, in terms, "awarding" the work to one of the contending parties, as is frequently Board practice,[17] the Board nonetheless found:

> In light of the above, we conclude that the relevant factors support the Employers' original assignment of this work to employees represented by the Engineers, and that the employees are entitled to the disputed work. We shall therefore determine the dispute in their favor.

As is clear from the Board's Decision and Determination of Dispute, the Board determined the dispute before it by finding specifically that the Operating Engineers were entitled to perform the work which it had described with specificity within the body of its decision. In finding that the Operating Engineers were "entitled" to the disputed work, and in then determining the dispute "in favor" of the Operating Engineers, the Board was, substantively and definitively, making an award or an assignment of the work. It augmented this determination by the further directive

17. See, e.g., *Sheet Metal Workers Local Union No. 332, AFL-CIO (Lear-Siegler, Inc.)* 176 NLRB No. 41, wherein the Board observed, "(w)e shall accordingly determine the dispute before us by awarding all installation of heating equipment . . ."

that the longshoremen were "not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employers to assign the above work to longshoremen represented by it." It is clear that the Board has construed the directive of the Supreme Court in the *CBS* case[18] as not requiring the "award" of disputed work assignments to be phrased in formula terms so long as it is specified definitively in the Decision and Determination of Dispute which of the groups claiming the right to perform the disputed tasks is entitled to the work.[19] Similarly, the proscription in the Board's Decision and Determination of Dispute in the instant case against Respondent's use of means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assign the work in issue to its members is the proscription which the Board has customarily included in its post-*CBS* Decisions and Determinations of Dispute.[20]

The Merits

The evidence establishes that Respondent has not at any time since its issuance complied with the Board's Decision and Determination of Dispute. Accordingly, the only re-

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18. The Court in *CBS* stated, "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then *specifically to award* such tasks in accordance with its decision." [Emphasis supplied.]

19. See, e.g., *International Union of Operating Engineers, Local Union No. 181 (E. C. Ernst, Inc.)* 174 NLRB No. 45, pp. 11-12; *International Brotherhood of Electrical Workers, Local 113, AFL-CIO (Westland Theatres, Inc.)* 180 NLRB No. 20, pp. 9-10; *Local 991, International Longshoremen's Association, AFL-CIO, Etc. (Union Carbide Chemical Company), supra*, p. 755.

20. See *N.L.R.B. v. International Longshoremen's and Warehousemen's Union, et al. (Aluminum Company of America)*, 71 LRRM 2500, enfg. 163 NLRB 1039, based upon conduct relating to the Board's Decision and Determination of Dispute reported at 158 NLRB 1024.

maining issue is whether Section 8(b)(4)(i)(ii)(D) was violated, as alleged in the complaint.

The evidence above recounted, including the abstention of the raftmen assigned to eight different cranes from performing their work tasks; the concession of the four raftmen to Krohn that they had been ordered to stand by until further orders; the statement of Roy Niemi to Stanley Radovich concerning the asserted reason for the actions of the raftmen and the statements of Respondent's representatives on the same subject made to representatives of PMA at the April 3 special meeting of the Astoria Joint Longshore Labor Relations Committee "meeting" all established—the latter conclusively so—the existence on April 3 of a Local 50 directed and supported policy of withholding in furtherance of Respondent's labor relations objective the services of longshoremen-raftmen. The evidence reveals a policy on the part of Respondent, extant on April 3, 1969, and persisting at times relevant herein, not to permit its members to perform any work in connection with the disputed log-loading assignment unless all the work required to successfully complete the assignment was performed by its members. Accordingly, I find that Respondent engaged in conduct rendering it responsible for the work stoppage that transpired, and that by and through its conduct which gave effectuation to its policy Respondent induced and encouraged raftmen employees, all of whom were its members, to engage in a strike. The evidence leaves little doubt that *an* object of the strike was to preempt the claim of the Operating Engineers to the work of operating the barge-mounted cranes and to force and require Brady and Jones to assign those work tasks to members of Respondent instead of employees represented by the Operating Engineers. Considerations of health and safety were manifestly

secondary and subordinate in nature to the jurisdictional considerations underlying the policy. Indeed, the decision by Respondent to claim the work may not be viewed as being unrelated tactically to efforts of craft unions, including the Operating Engineers, to expand their respective work jurisdictions along the waterfront. As the evidence establishes a strike by Respondent and successful inducement and encouragement of employees to engage in a strike and to refuse to perform employment services, all for the proscribed object of forcing Brady and Jones to assign the work of operating the floating cranes to members of Respondent to the exclusion of members of the Operating Engineers, I find that Section 8(b)(4)(i)(ii)(D) was, and has been, violated by Respondent.[21]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, set forth in section III, above, occurring in connection with the operations of the Employers described in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease

21. *Chicago Typographical Union No. 16, AFL-CIO (Central Typesetting and Electrotyping Co.), supra; Local Union No. 272, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Prestress Erectors, Inc.)* 172 NLRB No. 19, enfd. 427 F.2d 211 (C.A. 5); *Local 25, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)* 162 NLRB 703; see also *Local Union 825, International Brotherhood of Operating Engineers, AFL-CIO (Carleton Brothers Company)* 131 NLRB 452.

and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

Conclusions of Law

1. Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO, and International Longshoremen's and Warehousemen's Union, Local No. 50, are labor organizations within the meaning of Section 2(5) of the Act.

2. Willamette Western Corporation; General Construction Company; W. J. Jones & Son, Inc.; Brady-Hamilton Stevedore Company; and Pacific Maritime Association are, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6) and (7) and of Section 8(b)(4) of the Act.

3. The Respondent has failed and refused to comply with the Decision and Determination of Dispute issued by the Board on February 26, 1970.

4. By inducing and encouraging the employees of Brady and of Jones to engage in a work stoppage or otherwise to refuse to perform services for their respective employers; and by threatening, coercing and restraining Brady, Jones, Willamette, General and PMA, with an object of forcing or requiring Brady and Jones to assign the work of operating barge-mounted floating, whirly-type cranes to employees who are members of, or represented by, the Respondent rather than to employees who are represented by the Operating Engineers, all in a circumstance wherein Brady and Jones were not failing to conform to an order or certification of the Board determining the bargaining representative for employees preforming such work, the Respondent has

engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(D) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[22]

ORDER

Respondent, International Longshoremen's and Warehousemen's Union, Local No. 50, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Brady-Hamilton Stevedore Company, W. J. Jones & Son, Inc., or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or threatening, coercing, or restraining Brady-Hamilton Stevedore Company; W. J. Jones & Son, Inc.; Willamette Western Corporation; General Construction Company; Pacific Maritime Association, or any other employer or person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require Brady-Hamilton Steve-

22. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

dore Company and/or W. J. Jones & Son, Inc., to assign the work of operating barge-mounted whirly-type cranes at the Port of Astoria, Oregon, lifting bundles of logs from the water and placing them into the hold of a ship or a barge, to employees who are members of or represented by Respondent rather than to employees of Brady-Hamilton Stevedore Company and/or W. J. Jones & Son, Inc., who are represented by Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO, unless Brady-Hamilton Stevedore Company and/or W. J. Jones & Sons, Inc., are failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post in conspicuous places in its business offices, meeting halls, and all other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 19, shall, after being duly signed by an authorized representative of Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director for Region 19 for posting by Brady-

23. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Hamilton Stevedore Company; W. J. Jones & Son, Inc.; Willamette Western Corporation; General Construction Company; and/or Pacific Maritime Association at all locations where notices to their respective employees are customarily posted, said Employers willing.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision, what steps the Respondent has taken to comply herewith.[24]

Dated: APR 13 1971

/s/ JAMES T. BARKER
James T. Barker
Trial Examiner

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24. In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Appendix

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT engage in, or induce or encourage any individual employed by Brady-Hamilton Stevedore Company and/or W. J. Jones & Son, Inc., or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threaten, coerce, or restrain Brady-Hamilton Stevedore Company; W. J. Jones & Son, Inc.; Willamette Western Corporation; General Construction Company; Pacific Maritime Association, or any other employer or person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require Brady-Hamilton Stevedore Company and/or W. J. Jones & Son, Inc., to assign the work described below to employees who are members of or represented by Local No. 50, the Respondent herein, rather than to employees of Brady-Hamilton and/or W. J. Jones & Son, represented by Local No. 701 of the Operating Engineers, unless Brady Hamilton and/or W. J. Jones & Son is or are failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. The work involved consists of:

> Operating barge-mounted floating, whirly-type cranes lifting bundles of logs from the water and placing them

into the holds of ships and barges at the Employers' Astoria, Oregon operations.

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION LOCAL NO. 50
(*Labor Organization*)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 310 Six Ten Broadway Building, 610 S W Broadway, Portland, Oregon, 97205. Telephone Number 226-3431.

JAN 16 1975

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION AND NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of ILWU Local 50 in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION AND NATIONAL LABOR RELATIONS BOARD,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of ILWU Local 50 in Opposition

This case arises out of a dispute between the International Longshoremen's and Warehousemen's Union (ILWU) and Local 701 of the International Union of Operating Engineers (Local 701) with respect to whether longshoremen represented by the ILWU or operating engineers represented by Local 701 should be assigned the work of operating floating cranes used in the loading of logs aboard

ship by members of Pacific Maritime Association (PMA) at Astoria, Oregon. ILWU is the certified bargaining representative of employees doing longshore work, including the loading of logs aboard ship, for members of PMA in California, Oregon and Washington. ILWU and PMA have maintained a collective bargaining relationship since the ILWU's certification in 1938 (*Shipowners Association of the Pacific Coast*, 7 NLRB 1002). Prior to 1948, this relationship was a turbulent one. However, from 1948 until the record closed in this case in 1969, there was not a significant strike with respect to the ILWU-PMA longshore contract.

Neither PMA nor any of its members involved in this case have at any time had any collective bargaining relations with Local 701.

During their negotiations in 1959 and 1960, PMA and ILWU achieved "a peaceful and stable method of resolving labor crises caused by technological advancement" (Pet. App., 10a).[1] ILWU agreed to the elimination of earlier contract provisions and practices that prevented the efficient modernization and mechanization of cargo handling in California, Oregon and Washington, and in return, PMA agreed that longshoremen would not be replaced by non-longshoremen and that the employers would provide training to enable longshoremen to operate, with skill, efficiency and safety, any new equipment brought in to modernize and mechanize the industry. The Board has described this 1959-1960 contract settlement and the weight it will give to it in the following language:

> "The automation concord between Respondents and PMA has been widely acclaimed as a history-making

1. This reference is to the opinion of the Court below. Petitioner has printed the opinion below on pages 1a through 19a of the Appendix to its Petition.

precedent, a peaceful settlement of a problem which has troubled the west coast waterfront for a number of years. The parties are now living under that agreement, and urge us to honor their agreement as interpreted by them and their arbitrator. In the circumstances here presented, we have decided to do so." *International Longshoremen's and Warehousemen's Union (American Mail Line, Ltd.)*, 144 NLRB 1432, 1442 (1963).

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"In the companion case, we found after examining the above factors that the larger automation concord between Respondents and PMA far outweighed all other considerations. Thus, the parties' 1959-60 agreement, subsequently codified and supplemented, constituted a pioneering settlement between PMA and Respondents of the larger manpower and economic problems resulting from the increasing use of mechanized equipment on the waterfront. Though there is room for disagreement as to which particular pieces of equipment have been assigned to longshoremen under this agreement, the parties have established an arbitration procedure whereby their differences can be settled. In the instant case, Arbitrator Meehan decided that longshoremen were entitled to perform the crane work in question, and both Respondents and PMA, including the instant PMA employer, Albin, now urge us to honor their agreement as interpreted by them and their arbitrator. Consistent with our decision in Case No. 19-CD-53, and for the reasons expressed therein, we have decided to do so." *International Longshoremen's and Warehousemen's Union (Albin Stevedore Company)*, 144 NLRB 1443, 1448 (1963).[2]

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2. This Court has said:

"All parties agree that this agreement was an enlightened, forward-looking step in West Coast longshore labor relations. See Kossoris, Working Rules in West Coast Longshoring, 84

As cargo-handling technology progressed thereafter, the parties found that cranes were important tools that could be substituted for traditional cargo-hoisting gear. In 1962, they adopted a Crane Supplement to their contract. It defined as "longshore cranes" the various cranes operated on land or mounted aboard ship, and it confirmed explicitly that these were to be manned by longshoremen. Because, at the time of the adoption of the Crane Supplement, floating cranes were used only occasionally for sporadic jobs of a few hours' duration to handle extra heavy loads without displacing any longshoremen, who were employed in related work, the Crane Supplement stated that these are not "longshore cranes" and that non-longshoremen could be used for their operation. However, the Crane Supplement specifically included the further provision that the Joint Coast Labor Relations Committee, the final bipartite step in the ILWU-PMA contract administration and grievance procedure, could in the future agree to designate floating cranes as "longshore cranes" by agreement reached in that Committee.

During the sixties, PMA employers developed a cargo-handling technique that would substantially reduce the man-hours involved in loading logs aboard ship. Logs were prepackaged into large bundles of 25 to 35 tons. Because their weight exceeded the capacity of the ship's gear, this new technique required that these loads be hoisted aboard ship

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Monthly Labor Rev 1 (1961); Killingsworth, The Modernization of West Coast Longshore Work Rules, 15 Ind & Lab Rel Rev 295 (1962); ILWU (American Mail Line), 144 NLRB 1432, 1442 (1963)."

Volkswag. awerk v. Federal Maritime Commission, 390 U.S. 261, 264 (1967).

by floating cranes. This pre-packaging of logs replaced a procedure by which individual logs were made up into much smaller loads by the longshoremen working alongside the ship and were then hoisted aboard ship by the conventional ship's gear. After the new technique was used for a period of time and had become an established method of cargo-handling under the mechanization and modernization procedures, it became evident that non-longshoremen operating the floating cranes were replacing the longshoremen who had operated the normal ship's gear in the previous type of cargo operation. In these circumstances, the Joint Coast Labor Relations Committee agreed to designate floating cranes as "longshore cranes" in such operations and agreed that such cranes would be manned by longshoremen in loading logs. This agreement carried out the basic commitment that the utilization of new forms of equipment to mechanize and modernize cargo-handling on the Pacific Coast would not involve the substitution of non-longshoremen for longshoremen. In accordance with this agreement, the handling of logs was carried on with longshoremen operating the floating cranes.

In Astoria, Oregon, however, it was originally believed by both the longshoremen and the stevedore companies that they could not obtain floating cranes on a "bare boat" basis; that is, that the PMA stevedore contractor could not obtain a floating crane unless it would use the employees of the owner of the floating crane to operate it. Accordingly, the stevedore contractors in Astoria used floating cranes of heavy construction contractors with their construction industry employees as the equipment and employees to hoist the logs out of water to shipboard.

On April 3, 1969, the longshoremen in Astoria decided that the contract provision as to manning of floating cranes

should be enforced in that port. Asserting that it was unsafe to work with non-longshoremen, they stopped work under the safety issue work stoppage provision of the contract[3] The Astoria longshoremen also asserted that the employers were violating the ILWU-PMA contract by the use of the non-longshoremen. While the employers acknowledged that the contract required the use of longshoremen and did thereupon put them on the cranes, they proceeded through the grievance machinery to obtain a decision that the claim that the work was unsafe was a "gimmick". The longshoremen countered by asserting that the employers' violation of the contract by the use of non-longshoremen to operate the cranes justified their action.

The issues were taken to the Coast Arbitrator. He held that the longshoremen had improperly used the safety issue as a "gimmick" to present their grievance. However, he also held, and interpreted the contract to mean, that the contract required that longshoremen be used to man these cranes. He also held that the employer's violation did not justify the work stoppage.

After the operating engineers had been replaced by longshoremen, Local 701 started picketing and filed a charge against the Astoria local, Local 50 of the ILWU. In turn, PMA filed a charge against the Local 701 picketing. After a hearing, pursuant to the provisions of § 10(k) of the Act, a three-man panel of the Board determined that the operating engineers were entitled to the work in dispute and that the ILWU was not entitled to seek it through the means proscribed in § 8(b)(4). *International Longshore-*

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3. Because of the dangers involved in longshore work, the ILWU-PMA contract includes the provision that the longshoremen may stop work if they believe in good faith that an employer operation endangers their safety. However, it also provides that a safety claim shall not be used as a "gimmick" to raise other issues.

men's and Warehousemen's Union Local 50 (Jones Stevedoring), 181 NLRB 315.[4]

In its determination, the three-man panel of the Board limited itself to a consideration of the original Crane Supplement language. It ignored the subsequent action of the Joint Coast Labor Relations Committee, which had agreed that floating cranes were "longshore cranes". It ignored the ruling of Coast Arbitrator, which held that the contract had assigned the work of operating these particular floating cranes to the longshoremen. Additionally, it ignored the employer's clearly expressed preference that longshoremen should operate these cranes.

PMA and ILWU filed petitions for rehearing and reconsideration. These were presented to the full five-man Board. By a vote of three to two on July 24, 1970, the requests for Rehearing and Reconsideration were denied.[5]

Thereafter, in the subsequent unfair labor practice proceeding, the Board affirmed its § 10(k) order despite the challenges by ILWU and PMA to both the substance of the order and the procedures by which it was procured.[6]

The Board's order was reviewed by the Court of Appeals for the Ninth Circuit. That Court made a detailed analysis of the Board's handling of § 10(k) proceedings from 1962 to date and determined, from its review of these § 10(k) determinations, that the Board had consistently honored

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4. This Determination of Dispute is printed in the Appendix to the Petition herein (pages 20a to 39a).

5. This order of the full Board is printed at pages 1-3 of the Appendix to PMA's brief in opposition to the petition herein.

6. The Trial Examiner recognized the "fundamental" nature of the challenges to the Board's procedure (PMA App. 10-12, 24-25) but acknowledged that he was powerless to deal with them. The Board's decision (PMA App. 4-5) simply ignored them. The Court of Appeals did not "entertain such a sweeping challenge to the Board's procedures" because it granted the relief sought by ILWU and PMA on other grounds. (Pet. App. 4a, n. 1).

the contractual assignment of the work and the employer's expressed preference and that the Board had consistently assigned the work in accordance therewith. The Court of Appeals held that the Board had been in error where it concluded that the ILWU-PMA contract did not require the work to be done by the longshoremen, and when it paid no heed to the factor of employer preference.

The Court of Appeals referred to the conclusions of commentators who had examined the Board's § 10(k) determinations and found that the Board had failed "to articulate any decision-making standards" (Pet. App. 15a) and to the American Bar Association's special § 10(k) committee, which had found that the Board's decision-making practices in § 10(k) matters "had accomplished little more than to inject additional doubt and uncertainty into an already troublesome and difficult area of labor relations" (Pet. App. 16a).

The Court of Appeals then stated its own conclusions with respect to the Board's procedures under § 10(k) following the decision of this Court in *NLRB v. Radio and Television Engineers ("CBS")*, 364 U.S. 573, 576 (1960) and the statement by the Board in *International Association of Machinists, Lodge 1743 (J.A. Jones Construction Co.)* 135 NLRB 1402, 1410 (1962), the first Board opinion following the *CBS* mandate, in the following language:

> "Since its *Jones* decision, the Board has consistently maintained that its policy in making § 10(k) work awards is to decide each case on its own merits without announcing any standards or principles which govern the decisions that are made. Such a practice has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards. Such a practice makes life easy for the Board's Trial Examiners or Administrative Law Judges, and for the Board itself. To call the practice

> a policy, however, is a misnomer. It is a little like making a bouillabaisse or pot au feu. Various ingredients go into the pot and are stirred and simmered, and no matter what they are, or what quantity or quality of each is used, the product is always the same—a bouillabaisse or a pot au feu. Nobody can dispute the conclusion; nobody can say, except as a matter of personal taste, whether the result is good or bad.
>
> While the practice may be easy and comfortable for the Board, it makes judicial review virtually impossible, because the decision is totally unprincipled. There is no way for the reviewing court to determine what principles, if any, led to the decision. . . ." (Pet. App. 16a).

The Court of Appeals further stated that its own independent examination of the Board's § 10(k) decisions (in conformity with the reports of numerous commentators cited at Footnote 7 to its opinion [Pet. App. 17a]) established that the Board had consistently followed the policy of awarding the work to the employees who are assigned the work by a contract and who are preferred by employer. The Court went on to say that the Board in no way explained why it was not following its own prior decisions in this case. On this record the Court of Appeals held that the Board had engaged in this case in "standardless decision making" (Pet. App. 18a) and concluded (Pet. App. 19a):

> "In this case the only applicable collective bargaining agreement assigns the disputed work to the Longshoremen. The employers also appear to prefer that the work assignment go to the Longshoremen. In light of the Board's policy of giving controlling weight to these factors under similar circumstances, we are unable to conclude, absent convincing reasoning from the Board to the contrary, that the Board's work assignment to the Engineers is not arbitrary and capricious."

ARGUMENT

The writ sought should be denied because no novel or important issue is presented by the petition. It is well accepted that this Court has left to the Court of Appeals the task of determining whether the Board's findings of fact are supported by substantial evidence (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489-491 [1950]) and whether its legal conclusions are arbitrary and capricious or "rest on erroneous legal foundations". *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

The Court of Appeals correctly held (Pet. App. 9a) that the Board's findings that the ILWU-PMA contract did not assign the operation of floating cranes to longshoremen could not be sustained. There is no substantial evidence on the record considered as a whole (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 [1951]) to support this finding of the Board since it did not take into account the interpretation which the parties and the arbitrator had placed upon the contract[7] and therefore did not consider the contract, as so interpreted, as a factor to be weighed in making the work assignment.

The holding of the Court of Appeals on the substantiality of the evidence is not one requiring review by this Court since this "is a question which Congress has placed in the keeping of the Courts of Appeal". *Universal Camera Corp. v. NLRB*, supra, at 491.

Additionally, the determination of the Court of Appeals that the Board's finding on the contract issue was not supported by substantial evidence on the record as a whole because of the Board's refusal to take into account an interpretation which the parties and the Coast Arbitrator

7. "The substantiality of evidence must take into account whatever in the records fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, supra, at 488.

had placed upon the contract, is consistent with the rule that a question of contract construction is one of law for the courts and is not one of fact for an administrative agency. *Corbin on Contracts*, Vol. 3, § 554, pp. 218-227; *Aluminum Co. v. NLRB*, 159 F.2d 523, 525 (5th Cir., 1946), *Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers*, 83 F.Supp. 928, 930 (E.D. Pa., 1949).

Clearly, the Court of Appeals was correct in stating:

> "We are not bound to accept the Board's construction of a contract when it is not supported by substantial evidence and when it is not legally correct." (Pet. App. 9a).

Having concluded that the Board's finding of fact as to the meaning of the contract was not supported by substantial evidence on the record as a whole, the Court of Appeals properly determined that the error, plus the fact that the Board had totally ignored the factor of employer preference, made the Board's work assignment determination arbitrary and capricious and therefore unenforceable.[8]

The conclusion of the Court of Appeals, that the Board has consistently awarded the work to the employees represented by the union which has the only contract assignment for that work and has consistently honored the employer's preference, cannot be challenged. It is clearly demonstrated by the authorities cited in the opinion and by the inde-

8. The Court of Appeals also noted that the Board's failure to consider that the contract had been construed by the parties and the Coast Aribtrator to cover the work in dispute may also have resulted in "a misplaced emphasis on the factors of skill, efficiency and safety". (Pet. App. 10a). The contract contained an obligation on the part of PMA to train longshoremen so that they could safely and efficiently perform work on machinery introduced as a result of new technology. As the Court of Appeals stated, "If the Board had correctly determined that the contract covered the disputed work it might have given weight to the fact that the skill problem was anticipated by the parties". (Pet. App. 10a).

pendent analysis undertaken by the Court of Appeals. (Pet. App. 17a-18a).

The refusal to enforce the Order, in the absence of the Board's showing convincing reasons for its failure to follow its own established precedents, is an appropriate exercise of the reviewing court's duty to determine whether an order of the Board is arbitrary or capricious or rests on erroneous legal foundations.

The holding of the Court of Appeals was that the Board must articulate the reasons for its departure from its established precedents (Pet. App. 17a), "decisionmaking pattern" (Pet. App. 17a) and "policy" (Pet. App. 19a) so that a reviewing court can determine whether such a departure is arbitrary or capricious.

> "... The Board may still evaluate each jurisdictional dispute on its own merits and it need not be limited by a rigid set of standards or principles. But when the Board decides that certain factors take precedence over others, it must explain why and reconcile its decisions with its past judgments. Otherwise, § 10(k) will not bring the desired stability to the process by which jurisdictional disputes are resolved, and the courts will be unable to determine whether or not the Board's decisions are arbitrary and capricious." (Pet. App. 19a).

Such a holding, articulating the responsibility of the reviewing court, does not require further review here.

The conclusion of the Court of Appeals that a "bouillabaisse or pot au feu" adjudication is contrary to law is in accordance with numerous decisions of this Court. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: January 15, 1975

Respectfully submitted,

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ILWU Local 50

Of Counsel

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S LOCAL 50, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Board found that International Longshoremen's and Warehousemen's Union, Local No. 50 ("Longshoremen") violated Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D), by engaging in, and threatening, work stoppages for an object of forcing Brady-Hamilton Stevedore Company ("Brady") and W. J. Jones & Son, Inc. ("Jones") (collectively, "the Companies")

to assign certain work [1] to employees represented by Longshoremen rather than to employees represented by petitioner, Hoisting and Portable Engineers, Local No. 701, International Union of Operating Engineers, AFL-CIO ("Engineers"). 193 NLRB 266.[2] In an earlier proceeding, conducted pursuant to Section 10(k) of the Act, 29 U.S.C. 160(k), the Board had determined that employees represented by the Engineers, rather than those represented by the Longshoremen, were entitled to perform the disputed work (Pet. App. 25a, 37a-38a).

In awarding the work to employees represented by the Engineers, the Board considered and gave substantial weight to the facts that the prevailing practice on the West Coast was to assign such work to operating engineers; that, prior to the application of economic sanctions against them, the Companies had uniformly assigned this work to operating engineers; and that operating engineers, being more experienced and proficient, were better qualified to perform the work and could do so more economically and safely (Pet. App. 31a-37a). The Board rejected the contention that collective bargaining contracts supported the Longshoremen's claim to the work, stating (Pet. App. 33a-34a):

> Recent PMA-Longshoremen contracts provide that "All machinery, equipment and other tools now or

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[1] The operation of "barge-mounted floating whirly-type cranes lifting bundles of logs from the water and placing them into the holds of ships and barges at Employers' Astoria, Oregon, operations" (Pet. App. 37a-38a).

[2] This decision, which is omitted from the petition, is set forth as an appendix to the Brief in Opposition for Pacific Maritime Association, *et al.*, pp. 4-37.

hereafter used in moving cargo shall be operated by longshoremen when used in an operation covered by this Agreement and the operation thereof is assigned to longshoremen and is covered by this Agreement," with certain exceptions. One of the exceptions specified is the operation of cranes mounted on floating crane barges.* * *

On the other hand, the labor agreement between the Engineers and Willamette and General [3] includes under Article II, "Work Affected Defined," the following language:

> * * * including operation, maintenance, and repair of land and floating plant equipment, vehicles and other facilities used in connection with the described work and services, and all other work of similar nature.

2. The court of appeals sustained the Board's findings that an outstanding Longshoremen's certification did not support an award of the crane work to longshoremen; that at the time of the work stoppage the operating engineers were more skilled, efficient, and safe crane operators than were the longshoremen; and that past practice and the Longshoremen's acquiescence in the assignment of the crane work to operating engineers (until the strike here) supported a work award to the Engineers (Pet. App. 6a-7a). The court, however, held that the Board improperly found that the

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[3] Brady and Jones leased waterborne whirly cranes from Willamette Western Corporation and General Construction Company. Prior to the Longshoremen's strike pressure, these cranes were leased complete with operator and fireman, all of whom were members of the Engineers (Pet. App. 26a).

PMA-Longshoremen collective bargaining contract—to which Brady and Jones were bound—did not cover the disputed work. The court pointed out that, on May 8, 1969, after the work stoppage, an arbitrator had ruled that the contract did assign the work of operating floating cranes in Astoria to the Longshoremen (Pet. App. 7a). The fact that the Engineers was not a party to the arbitration did not, in the court's view, justify the Board in ignoring the ruling. For the "purpose of the arbitration was to decide upon the meaning of the agreement, and therefore the only logical or necessary parties to the arbitration were the parties bound by it, the Longshoremen and the PMA, acting for Brady and Jones" (Pet. App. 8a-9a).

Concluding that "the Board's erroneous finding or conclusion about the applicability of the PMA-Longshoremen contract" (Pet. App. 11a) may have led to "a misplaced emphasis on the factors of skill, efficiency and safety" and to an ignoring of "the efforts of labor and management to provide for a peaceful and stable method of resolving labor crises caused by technological advancement" (Pet. App. 10a), the court remanded the case to the Board for reconsideration of its 10(k) decision. In so doing, the court stated (Pet. App. 18a-19a):

> The Board's work award to the Engineers conflicts with two of the factors that the Board often relies upon. It is possible, of course, that the Board may think that the Engineers should get the work despite the PMA-Longshoremen contract and the employers' preference. On the other hand, the Board may determine that in light of the correct interpretation of the

contract, the factors of skill, efficiency, safety, acquiescence and past practice are not controlling. Our reversal of the Board's conclusion as to the applicability of the contract precludes us from sustaining the Board's work assignment in this case. The Board must be given the first opportunity to use its accumulated expertise and make a principled rather than an arbitrary award of the work in light of the correct construction of the contract.

3. The petition raises two basic questions: (a) whether the court of appeals exceeded its reviewing authority by requiring the Board, in determining a jurisdictional dispute under Section 10(k) of the Act, to give greater weight to the factors of employer preference and contract coverage than to other factors (Pet. 28-39); and (b) whether the court of appeals' action in requiring the Board to give effect to the PMA-Longshoremen arbitration award, though the Engineers were not a party to the arbitration, is contrary to *National Labor Relations Board* v. *Plasterers' Union,* 404 U.S. 116 (Pet. 46-50). Although the Board did not petition for a writ of certiorari in this case, it is of the view that these issues were decided incorrectly by the court of appeals and is prepared to support the petitioner on

the merits should this Court grant certiorari. Accordingly, the Board does not oppose the granting of the Engineers' petition.

Respectfully submitted.

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